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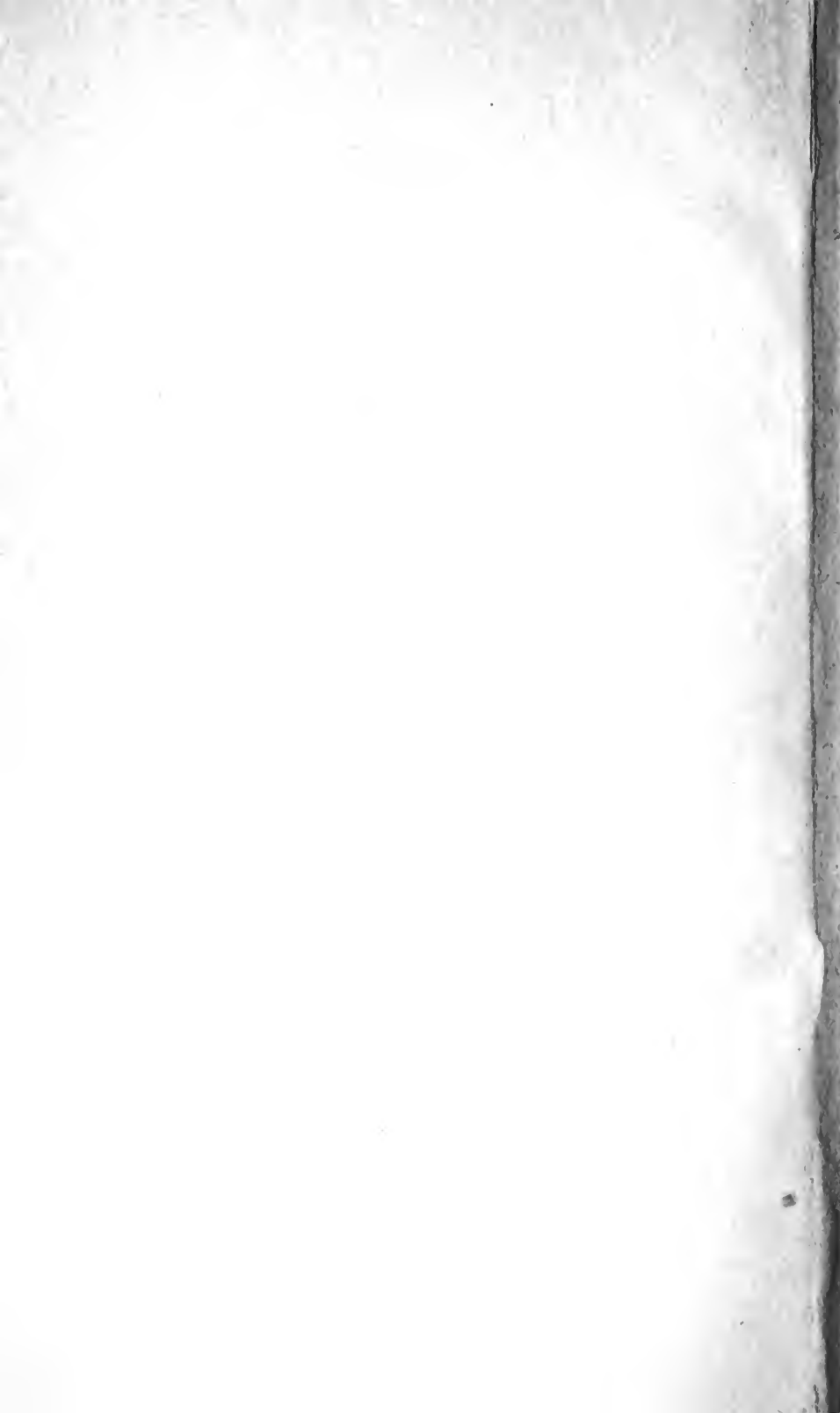
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U.S. CASE 306 1
No. 15945

United States
Court of Appeals
for the Ninth Circuit

ALBERT GERSTEN, MYRON P. BECK and
ANN H. BECK, MILTON GERSTEN and
MARY GERSTEN, Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petitions to Review Decisions of The Tax
Court of the United States

FILED

MAY 14 1958

PAUL P. O'BRIEN, CLERK



No. 15945

United States
Court of Appeals
for the Ninth Circuit

ALBERT GERSTEN, MYRON P. BECK and
ANN H. BECK, MILTON GERSTEN and
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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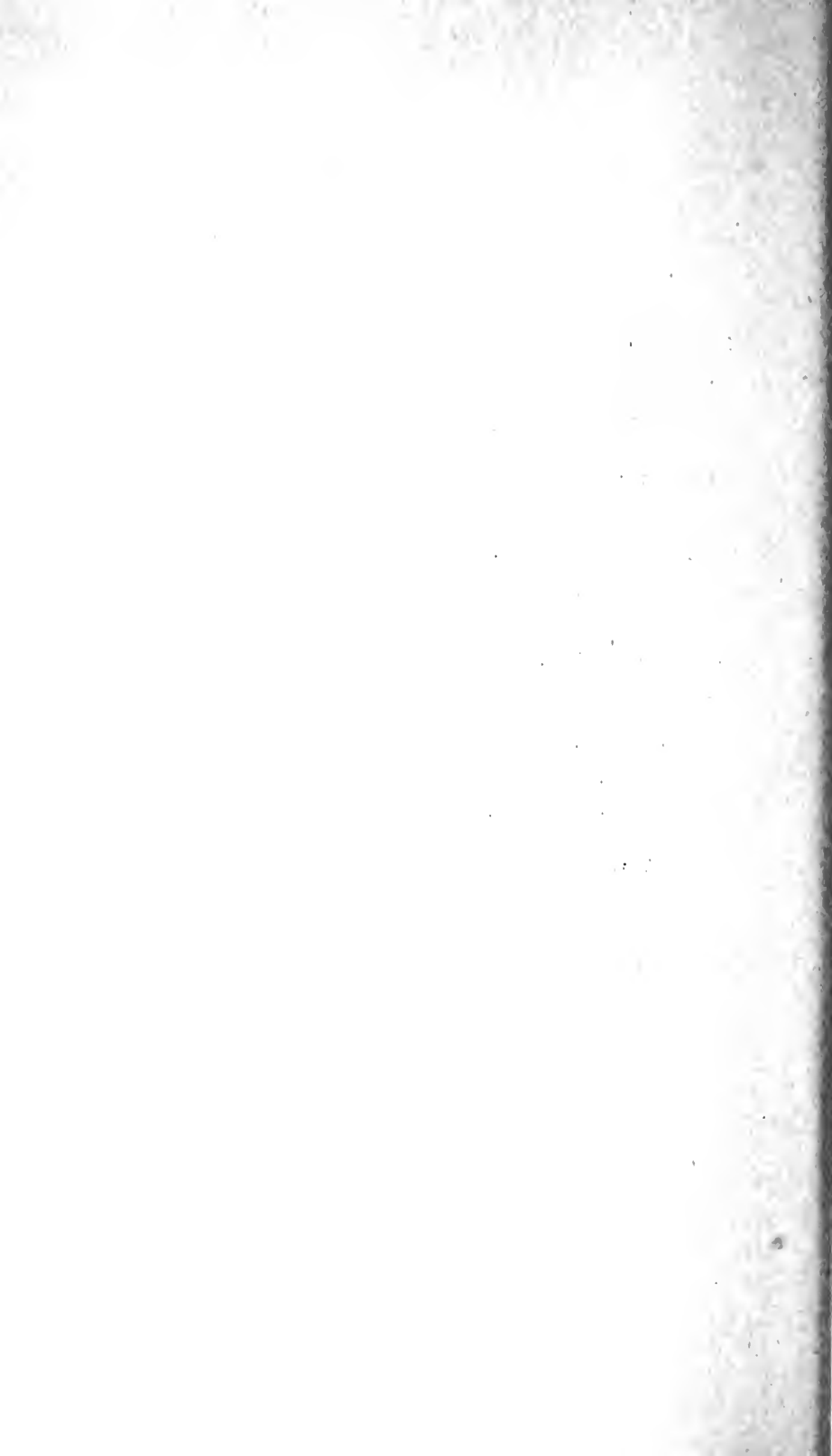


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Attorney,
Department of Justice,
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Attorneys for Respondent.



Jan. 13—Copy of answer served on taxpayer—Los Angeles, Calif.

1955

Feb. 8—Hearing set April 25, 1955, Los Angeles, Calif.

Apr. 29—Hearing had before Judge Turner on the merits on petitioner's oral motion to consolidate dockets 51226 to 51242, incl.—Granted. Stipulation of facts filed at hearing. Briefs due 120 days from 4/29/55; Replies due 165 days from 4/29/55.

May 17—Transcript of Hearing 4/29/55 filed.

Aug. 24—Supplemental stipulation of facts, filed.

Aug. 26—Motion for extension to Sept. 6, 1955 to file brief filed by General Counsel. 8/29/55—Granted.

Aug. 29—Brief filed by taxpayer. (P) 9/28/55 copy served.

Sep. 6—Motion for extension of time to 9/27/55 to file brief, filed by General Counsel. 9/7/55—Granted.

Sep. 27—Brief filed by General Counsel.

Nov. 10—Motion for extension to 11/25/55 to file reply brief filed by taxpayer. 11/10/55—Granted.

Nov. 25—Reply Brief filed by petitioner. Copy served 11/28/55. Printed brief received 12/5/55.

Dec. 27—Motion for substitution of printed reply brief in place and stead of typewritten briefs heretofore filed, filed by petitioner. 2/3/56—Granted.

1956

Feb. 3—Order that the respondent is allowed 45 days from this date within which to file his reply brief. entered.

Mar. 16—Motion for extension to April 9, 1956 to file Reply Brief. filed by Respondent. Granted 3 19 56. Served 3 21 56.

Apr. 9—Reply Brief filed by Respondent. Served 4 10 56.

1957

Jun. 28—Findings of Fact and Opinion filed. Judge Turner. Decision will be entered under Rule 50. Served 6 28 57.

Oct. 25—Agreed computation.

Oct. 30—Decision entered. Judge Turner. Served 10 31 57.

1958

Jan. 24—Petition for Review by U. S. Court of Appeals, 9th Circuit with proof of service attached. filed by petitioner.

Feb. 5—Designation of Contents of Record on Review with proof of service. filed.

Feb. 14—Designation of additional portions of record on review with proof of service thereon. filed by Respondent.

Feb. 20—Order extending time for filing record on review and docketing petition for review. to April 24, 1958.

The Tax Court of the United States

Docket No. 51228

MYRON P. BECK and ANN H. BECK,
Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

[Note: Docket Entries in Docket No. 51228
are the same as Docket No. 51226 except for
the following]:

1954

Jan. 6—Answer filed by General Counsel.

Jan. 14—Copy of answer served on taxpayer, Los
Angeles, Calif.

1958

Feb. 6—Designation of Contents of Record on Re-
view with proof of service, filed.

The Tax Court of the United States

Docket No. 51229

MILTON GERSTEN and MARY GERSTEN,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

[Note: Docket Entries in Docket No. 51229

are the same as Docket No. 51226 except for the following]:

1954

Jan. 6—Answer filed by General Counsel.

Jan. 14—Copy of answer served on taxpayer, Los Angeles, Calif.

1958

Feb. 6—Designation of contents of record on review with proof of service thereon, filed.

[Title of Tax Court and Docket No. 51226.]

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency dated August 24, 1953, and as a basis of his proceeding alleges as follows:

1. Petitioner is an individual whose residence is 6363 Wilshire Boulevard, Los Angeles 48, California. The return for the period here involved was a joint return of petitioner and of Bernice Ann Gersten, as husband and wife, and was filed with the Collector of Internal Revenue for the Sixth District of California.

2. The Notice of Deficiency (a copy of which is attached and marked Exhibit "A") was mailed to petitioner on August 24, 1953.

3. The deficiency as determined by the Commissioner is in income taxes as follows:

| Year | Deficiency |
|-----------------|-------------|
| 1950 Income Tax | \$10,429.15 |

The entire deficiency is in dispute.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) Respondent erred in determining that long term capital gains received by petitioner in said year in respect of the liquidation of Lawrence Land Co. were understated in petitioner's Federal income tax return for said year by \$6,120.78, and in failing to determine that petitioner overstated his long term capital gains in respect of said liquidation by \$4,990.64.

(b) Respondent erred in determining that long term capital gains received by petitioner in said year in respect of the liquidation of Whittier Development Co. were understated in petitioner's Federal income tax return for said year by \$5,893.80, and in failing to determine that petitioner overstated his long term capital gains in respect of said liquidation by \$3,464.72.

(c) Respondent erred in determining that long term capital gains received by petitioner in said year in respect of the liquidation of Rex Land Co. were understated in petitioner's Federal income tax return for said year by \$3,566.34.

(d) Respondent erred in determining that long term capital gains received by petitioner in said year in respect of the liquidation of J. Richard Co. were understated in petitioner's Federal income tax return for said year by \$8,854.74.

(e) Respondent erred in determining that the return filed by petitioner and his wife, Bernice Ann

Gersten, for the taxable year 1950, constituted only a separate return of petitioner and not the joint return of petitioner and his said wife.

5. The facts upon which petitioner relies as a basis for this proceeding, are as follows:

(a) On or about March 15, 1950, petitioner purchased 60 shares of the stock of Lawrence Land Co. (hereinafter referred to as "Lawrence") for the sum of \$6,000.00. Said 60 shares represented 40% of all of the stock of Lawrence issued and outstanding at all times material hereto.

(b) Lawrence was a corporation incorporated pursuant to the laws of the State of California on or about March 25, 1949, and on that date commenced to do business within the State of California.

(c) Lawrence's business consisted of the subdivision of unimproved land into residential lots, including the installation of subdivision improvements, the erection of residences or homes upon such lots, and the sale thereof.

(d) On December 31, 1950, Lawrence was finally wound up and dissolved, and on or about said date its assets were distributed to its stockholders proportionately to their stock holdings.

(e) Pursuant to the winding up and complete liquidation of Lawrence petitioner received as his proportion of the assets of Lawrence the sum of \$78,382.40 in cash, and an undivided 40% interest in certain real property in the County of Los Angeles, State of California, which undivided interest had a then fair market value of \$29,840.00. There

was also assigned to petitioner, in connection with said liquidation, a 40% interest in a certain contract, dated January 25, 1950, as amended February 9, 1950, between Lawrence and San Gabriel Valley Water Company (hereinafter referred to as "San Gabriel").

(f) In connection with the dissolution of Lawrence, petitioner and the other stockholders of Lawrence entered into a written agreement on December 26, 1950, in which said stockholders assumed and became responsible for all of the debts, obligations and liabilities of Lawrence. Said agreement was entered into in order to comply with sections 5000 and 5001 of the Corporations Code of the State of California pertaining to voluntary dissolutions of corporations.

(g) The undisputed amount of Lawrence's liability under the Excess Profits Tax Act of 1950, as amended, as of the time of its dissolution, was \$12,476.68, and petitioner's obligation in respect thereof, pursuant to his assumption of liability under the agreement referred to in paragraph 5 (f) above, amounted to \$4,990.64. Petitioner's accountant, at the time he prepared petitioner's 1950 Federal income tax return, failed to take into account said sum of \$4,990.64 so assumed by petitioner and accordingly, overstated petitioner's long term capital gain in respect of the dissolution of Lawrence by the sum of \$4,990.64.

(h) At all times material hereto San Gabriel was engaged in the business of supplying water to residences and other properties located in the dis-

tract in which the tract of real property of Lawrence was situated.

(i) Pursuant to said contract, San Gabriel agreed to extend its pipelines for the servicing of water to Lawrence's property upon payment to it by Lawrence of the sum of \$31,021.00.

(j) Said contract further provided for contingent refunds to Lawrence by San Gabriel of all, or a portion, of the said sum of \$31,021.00, up to the whole thereof.

(k) By the terms of said contract, the aggregate amount of such refunds, if any, was dependent upon the amount of gross revenue, if any, which San Gabriel might receive, within a limited period of time, from the sale of water to consumers within the tract being developed by Lawrence.

(l) At all times material hereto, neither Lawrence nor San Gabriel had any control over any purchases of water which such consumers might make from San Gabriel.

(m) On or about March 21, 1950, petitioner purchased 400 shares of the stock of Whittier Development Co. (hereinafter referred to as "Whittier") for the sum of \$4,000.00, and thereafter and until the dissolution of Whittier owned 400 shares thereof. Said 400 shares represented 40% of all of the stock of Whittier issued and outstanding at all times material hereto.

(n) Whittier was a corporation incorporated pursuant to the laws of the State of California on or about August 20, 1948, and during the month of

July of 1949 commenced to do business within the State of California.

(o) Whittier's business consisted of the subdivision of unimproved land into residential lots, including the installation of subdivision improvements, the erection of residences or homes upon such lots, and the sale thereof.

(p) On December 28, 1950, Whittier was finally wound up and dissolved, and on or about said date, its assets were distributed to its stockholders proportionately to their stock holdings.

(q) Pursuant to the winding up and complete liquidation of Whittier petitioner received as his proportion of the assets of Whittier the sum of \$77,160.27 in cash. There was also assigned to petitioner, in connection with said liquidation, a 40% interest in a certain contract, dated November 29, 1949, between Whittier and San Gabriel, and a 40% interest in a certain contract, dated March 10, 1950, between Whittier and San Gabriel.

(r) In connection with the dissolution of Whittier, petitioner and the other stockholders of Whittier entered into a written agreement on December 16, 1950, in which said stockholders assumed and became responsible for all of the debts, obligations and liabilities of Whittier. Said agreement was entered into in order to comply with sections 5000 and 5001 of the Corporations Code of the State of California pertaining to voluntary dissolutions of corporations.

(s) The undisputed amount of Whittier's liability under the Excess Profits Tax Act of 1950, as

amended, as of the time of its dissolution, was \$8,661.79, and petitioner's obligation in respect thereof, pursuant to his assumption of liability under the agreement referred to in paragraph 5 (r) above, amounted to \$3,464.72. Petitioner's accountant, at the time he prepared Petitioner's 1950 Federal income tax return, failed to take into account said sum of \$3,464.72 so assumed by petitioner and accordingly, overstated petitioner's long term capital gain in respect of the dissolution of Whittier by the sum of \$3,464.72.

(t) At all times material hereto San Gabriel was engaged in the business of supplying water to residences and other properties located in the district in which the tracts of real property of Whittier were situated.

(u) Pursuant to the contract dated November 29, 1949, San Gabriel agreed to extend its pipelines for the servicing of water to one of the tracts being developed by Whittier upon the payment to it by Whittier of the sum of \$23,841.00.

(v) In said contract it further provided for contingent refunds to Whittier by San Gabriel of all, or a portion, of the said sum of \$23,841.00.

(w) Pursuant to the contract dated March 10, 1950, San Gabriel agreed to extend its pipelines for the servicing of water to another of the tracts being developed by Whittier upon payment to it by Whittier of the sum of \$5,214.00.

(x) Said contract further provided for contingent refunds to Whittier by San Gabriel of all, or a portion, of the said sum of \$5,214.00.

(y) By the terms of said contracts, the aggregate amounts of such refunds, if any, were dependent upon the amount of gross revenue, if any, which San Gabriel might receive, within a limited period of time, from the sale of water to consumers within the tracts being developed by Whittier.

(z) At all times material hereto, Whittier had no control over any purchases of water which such consumers might make from San Gabriel.

(aa) On or about February 8, 1949, petitioner purchased 50 shares of the stock of Rex Land Co. (hereinafter referred to as "Rex") for the sum of \$5,000.00. Said 50 shares represented 50% of all of the stock of Rex issued and outstanding at all times material hereto.

(bb) Rex was a corporation incorporated pursuant to the laws of the State of California on or about February 4, 1949, and on that date commenced to do business within the State of California.

(cc) Rex's business consisted of the subdivision of unimproved land into residential lots, including the installation of subdivision improvements, the erection of residences or homes upon such lots, and the sale thereof.

(dd) On November 8, 1950, Rex was finally wound up and dissolved, and on or about said date its assets were distributed to its stockholders proportionately to their stock holdings.

(ee) Pursuant to the winding up and complete liquidation of Rex petitioner received as his proportion of the assets of Rex the sum of \$1,158.84 in

cash, and an undivided 50% interest in certain real property in the County of Los Angeles, State of California, which undivided interest had a then fair market value of \$118,000.00. There was also assigned to petitioner, in connection with said liquidation, a 50% interest in a certain contract, dated February 3, 1949, between Albert Gersten and San Gabriel. Albert Gersten had executed said contract in his own name but for the benefit of Rex and subsequently, in February of 1949, assigned said contract to Rex.

(ff) At all times material hereto San Gabriel was engaged in the business of supplying water to residences and other properties located in the district in which the tract of real property of Rex was situated.

(gg) Pursuant to said contract, San Gabriel agreed to extend its pipelines for the servicing of water to Rex's property upon payment to it by Rex of the sum of \$14,707.20.

(hh) Said contract further provided for contingent refunds to Rex by San Gabriel of all, or a portion, of the said sum of \$14,707.20.

(ii) By the terms of said contract, the aggregate amount of said refunds, if any, was dependent upon the amounts of gross revenue, if any, which San Gabriel might receive, within a limited period of time, from the sale of water to consumers within the tract being developed by Rex.

(jj) At all times material hereto, Rex had no control over any purchases of water which such consumers might make from San Gabriel.

(kk) On or about July 10, 1947, petitioner purchased 1005 shares of the common stock of J. Richard Co. (hereinafter referred to as "Richard") for the sum of \$10,050.00. Said 1005 shares represented 50% of all of the common stock of Richard issued and outstanding at all times material hereto.

(ll) Richard was a corporation incorporated pursuant to the laws of the State of California on or about July 10, 1947, and on that date commenced to do business within the State of California.

(mm) Richard's business consisted of the subdivision of unimproved land into residential lots, including the installation of subdivision improvements, the erection of residences or homes upon such lots, and the sale thereof.

(nn) On June 22, 1950, Richard was finally wound up and dissolved, and on or about said date its assets were distributed to its stockholders proportionately to their stock holdings.

(oo) Pursuant to the winding up and complete liquidation of Richard petitioner received as his proportion of the assets of Richard the sum of \$38,202.12 in cash. There was also assigned to petitioner, in connection with said liquidation, a 50% interest in a certain contract, dated November 21, 1947, between Albert Gersten and San Gabriel, and a 50% interest in a certain contract, dated November 30, 1948, between Albert Gersten and San Gabriel. Albert Gersten had executed said contracts in his own name, but for the benefit of Richard, and subsequently, in November 1947 and December

1948 respectively, Gersten assigned said contracts to Richard.

(pp) At all times material hereto San Gabriel was engaged in the business of supplying water to residences and other properties located in the district in which the tracts of real property of Richard were situated.

(qq) Pursuant to the contract dated November 21, 1947, San Gabriel agreed to extend its pipelines for the servicing of water to one of the tracts being developed by Richard upon the payment to it by Richard of the sum of \$23,764.00.

(rr) Said contract further provided for contingent refunds to Richard by San Gabriel of all, or a portion, of the said sum of \$23,764.00.

(ss) Pursuant to the contract dated November 30, 1948, San Gabriel agreed to extend its pipelines for the servicing of water to one of the tracts being developed by Richard upon the payment to it by Richard of the sum of \$15,258.00.

(tt) Said contract further provided for contingent refunds to Richard by San Gabriel of all, or a portion, of the said sum of \$15,258.00.

(uu) By the terms of said contracts, the aggregate amounts of such refunds, if any, were dependent upon the amount of gross revenue, if any, which San Gabriel might receive, within a limited period of time, from the sale of water to consumers within the tracts being developed by Richard.

(vv) At all times material hereto, Richard had no control over any purchases of water which such consumers might make from San Gabriel.

(ww) Prior to December 1950, petitioner was married to one Lucille Gersten. On or about March 31, 1950, an interlocutory decree of divorce was granted to said Lucille Gersten and petitioner by the Superior Court of the State of California, in and for the County of Los Angeles. In November 1950 there was granted to petitioner, by a competent Court of Mexico having jurisdiction therein, a final decree of divorce from said Lucille Gersten, finally and completely dissolving the marriage which theretofore existed between petitioner and said Lucille Gersten.

(xx) On November 2, 1950, following said final decree of divorce, petitioner married his present wife, Bernice Ann Gersten, in Mexico.

(yy) On or about May 7, 1951, petitioner and said Bernice Ann Gersten executed and caused to be filed on or about said date their joint United States Individual Income Tax Return, with the Collector of Internal Revenue for the Sixth District of California. The time for the filing of said return had theretofore been extended by respondent, upon the request of petitioner and said Bernice Ann Gersten, to May 15, 1951.

(zz) Petitioner alleges that if the foregoing allegations set forth in paragraph 5, subparagraphs (g) and (s) above, with respect to the overstatement of long term capital gains for the taxable year 1950, together with the remaining allegations with respect to said taxable year, are determined to be correct, petitioner will be entitled to a refund with respect to said year 1950 based upon an overassessment in the amount of at least \$2,113.84.

Wherefore, petitioner prays that this Court may hear the proceedings and determine that no deficiency is due from him for the taxable year 1950, but that petitioner is entitled to a refund for the said taxable year based upon an overassessment in the amount of at least \$2,113.84; and that this Court grant such other general or special relief as may be by law provided.

/s/ JACOB SHEARER,

/s/ LEHMAN C. AARONS,

Counsel for Petitioner.

Duly Verified.

EXHIBIT "A"

Regional

1250 Subway Terminal Building

417 South Hill Street

Los Angeles 13, California

ARC-Ap:SF LA:90D:PAK

Aug. 24, 1953

Mr. Albert Gersten

6363 Wilshire Boulevard

Los Angeles 48, California

Dear Mr. Gersten:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1950 discloses a deficiency of \$10,429.15, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days from the date of the mailing of

this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute, in duplicate, the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, 1250 Subway Terminal Building, 417 South Hill Street, Los Angeles 13, California. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. COLEMAN ANDREWS,

Commissioner of Internal Revenue,

/s/ By W. T. TIGNOR,

Associate Chief, Appellate Division.

PAKar:lae

Enclosures:

Statement

Form 1276

Agreement Form

Statement

ARC-Ap:SF LA:90D:PAK

Mr. Albert Gersten, 6363 Wilshire Boulevard, Los Angeles 48, California

Tax Liability for the Taxable Year Ended December 31, 1950.

Year: 1950. Income tax—Deficiency: \$10,429.15.

In making this determination of your income tax liability careful consideration has been given to the report of examination dated September 23, 1952, to your protest dated November 6, 1952, and to the statements made at a hearing held on January 27, 1953.

You filed a joint return for the year 1950 with your wife Bernice Ann Gersten. It has been determined that, since under the laws of the State of California, an interlocutory decree of divorce from Lucille Gersten was in effect as of December 31, 1950, only a separate return will be recognized in accordance with Section 51(b)(1) of the Internal Revenue Code.

Accordingly, the amount of your income tax liability for this taxable year is determined herein on the basis of a separate return and the exemption claimed, in the joint return filed, with respect to said Bernice Ann Gersten is disallowed as a credit to you.

A copy of this letter and statement has been mailed to your representative, Mr. Jacob Shearer, 6535 Wilshire Boulevard, Los Angeles 48, Califor-

nia, in accordance with the authorization contained in the power of attorney executed by you.

| Adjustments to Net Income | |
|---|--------------|
| Taxable Year Ended December 31, 1950 | |
| Net income as disclosed by return | \$190,104.35 |
| Additional income and unallowable deductions: | |
| (a) Long-term capital gains | 11,104.87 |
| (b) Taxes disallowed | 195.00 |
| (c) Travel and entertainment expense disallowed | 1,800.00 |
| | <hr/> |
| Total | \$203,204.22 |
| Reduction: | |
| (d) Income from partnerships | 57.92 |
| | <hr/> |
| Net income adjusted | \$203,146.30 |

Explanation of Adjustments

(a) It is determined that the correct amount of net long-term capital gain realized during this taxable year is \$169,451.68 instead of the amount, \$158,346.81, reported in your return or an increase of \$11,104.87. The amount of such increase is determined upon the adjustments of the fair market values of your share of property received upon the liquidation of the corporations named below:

| | |
|--|-------------|
| (1) J. Richard Co. fair market value increased | \$ 8,854.74 |
| (2) Whittier Development Co. fair market value increased | 5,893.80 |
| (3) Rex Land Co. fair market value increased | 3,566.34 |
| (4) Lawrence Land Co. fair market value increased | 6,120.78 |
| | <hr/> |
| Total increase | \$24,435.66 |
| Long-term capital gain—50% of \$24,435.66 | \$12,217.83 |
| Less: | |
| (5) Capital loss carry-over | 1,112.96 |
| | <hr/> |
| Net increase of long-term capital gain | \$11,104.87 |

Explanation

(1) It is determined that the fair market value of water contracts received by you is \$8,854.74. No value was reported by you upon such contracts.

(2) The fair market value of property received from Whittier Development Co. (to which no value was reported in your return) is determined in the following amounts:

| | |
|-----------------------------------|------------|
| Value of water contracts | \$5,515.80 |
| Value of refundable deposit | 378.00 |

Increase as above \$5,893.80

(3) The fair market value of property received from Rex Land Co. (to which no value was reported in your return) is determined in the following amounts:

| | |
|--------------------------------------|------------|
| Fair market value of water contracts | \$3,439.54 |
| Fair market value of state tax claim | 126.80 |

Net increase as above \$3,566.34

(4) The fair market value of water contracts (to which no value was reported in your return) received from Lawrence Land Co. is determined in the amount of \$6,120.78.

(5) A capital loss carry-over, not previously claimed by you, is allowed in the amount of \$1,112.96 and representing a capital loss carry-over from the taxable year ended December 31, 1949.

(b) It is determined that the correct deduction for social security taxes is the amount of \$30.00 instead of the amount, \$225.00, claimed in your return, or a decrease of \$195.00.

(c) Items of travel and entertainment expense amounting to \$1,800.00 have not been substantiated as proper deductions under section 23 (a) of the Internal Revenue Code and are disallowed.

(d) It is determined that the correct amount of your distributive share of the loss of the partnership, Superior Building Company, is \$193.90 instead of the loss, \$135.98, reported in your return, or an increase of \$57.92.

Computation of Alternative Tax

Taxable Year Ended December 31, 1950

| | |
|--|--------------|
| Net income adjusted | \$203,146.30 |
| Less: Excess of net long-term capital gain over net short-term capital loss | 169,451.68 |
| Ordinary net income | \$ 33,694.62 |
| Less: Exemptions | 1,200.00 |
| Balance, subject to surtax and normal tax | \$ 32,494.62 |

| | |
|---|--------------|
| Tentative surtax | \$13,806.66 |
| Tentative normal tax at 3%..... | 974.84 |
| | <hr/> |
| Total tentative tax | \$14,781.50 |
| Less: reduction under Sec. 12 (c) | |
| I.R.C. | 1,346.34 |
| | <hr/> |
| Partial tax | \$ 13,435.16 |
| Plus: 50 per cent of \$169,451.68 | 84,725.84 |
| | <hr/> |
| Alternative tax | \$ 98,161.00 |

Computation of Tax
Taxable Year Ended December 31, 1950

| | |
|---|--------------|
| Net income adjusted | \$203,146.30 |
| Less: Exemptions | 1,200.00 |
| | <hr/> |
| Balance, subject to surtax and normal tax | \$201,946.30 |
| Tentative surtax | \$152,532.74 |
| Tentative normal tax at 3% | 6,058.39 |
| | <hr/> |
| Total tentative tax | \$158,591.13 |
| Less: reduction under Sec. 12 (c), | |
| I.R.C. | 13,293.15 |
| | <hr/> |
| Total normal tax and surtax | \$145,297.98 |
| Alternative tax | \$ 98,161.00 |
| Correct income tax liability | \$ 98,161.00 |
| Income tax liability shown on return, account No. | |
| 5-315090 | 87,731.85 |
| | <hr/> |
| Deficiency of income tax | \$ 10,429.15 |

Served: Nov. 13, 1953.

[Endorsed]: T.C.U.S. Filed Nov. 12, 1953.

[Title of Tax Court and Docket No. 51226.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4. Denies the allegations of error contained in paragraph 4 of the petition and all subparagraphs thereunder.

5. (a) to (d), inclusive. Admits the allegations contained in subparagraphs (a) to (d), inclusive, of paragraph 5 of the petition.

(e), (f) and (g). Denies the allegations contained in subparagraphs (e), (f) and (g) of paragraph 5 of the petition.

(h), (i) and (j). Admits the allegations contained in subparagraphs (h), (i) and (j) of paragraph 5 of the petition.

(k) and (l). Denies the allegations contained in subparagraphs (k) and (l) of paragraph 5 of the petition.

(m) to (p), inclusive. Admits the allegations contained in subparagraphs (m) to (p), inclusive, of paragraph 5 of the petition.

(q), (r) and (s). Denies the allegations contained in subparagraphs (q), (r) and (s) of paragraph 5 of the petition.

(t) to (x), inclusive. Admits the allegations contained in subparagraphs (t) to (x), inclusive, of paragraph 5 of the petition.

(y) and (z). Denies the allegations contained in subparagraphs (y) and (z) of paragraph 5 of the petition.

(aa) to (dd), inclusive. Admits the allegations contained in subparagraphs (aa) to (dd), inclusive, of paragraph 5 of the petition.

(ee) Denies the allegations contained in subparagraph (ee) of paragraph 5 of the petition.

(ff), (gg) and (hh). Admits the allegations contained in subparagraphs (ff), (gg) and (hh) of paragraph 5 of the petition.

(ii) and (jj). Denies the allegations contained in subparagraphs (ii) and (jj) of paragraph 5 of the petition.

(kk) to (nn), inclusive. Admits the allegations contained in subparagraphs (kk) to (nn), inclusive, of paragraph 5 of the petition.

(oo). Denies the allegations contained in subparagraph (oo) of paragraph 5 of the petition.

(pp) to (tt), inclusive. Admits the allegations contained in subparagraphs (pp) to (tt), inclusive, of paragraph 5 of the petition.

(uu) to (zz), inclusive. Denies the allegations contained in subparagraphs (uu) to (zz), inclusive, of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ DANIEL A. TAYLOR, REM,
Chief Counsel, Internal
Revenue Service.

Of Counsel: Woolvin Patten, Acting Regional Counsel, E. C. Crouter, Associate Appellate Counsel, R. E. Maiden, Jr., Assistant Appellate Counsel, Clayton J. Burrell, Special Attorney, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed Jan. 5, 1954.

[Title of Tax Court and Docket No. 51228.]

PETITION

The above named petitioners hereby petition for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his Notice of Deficiency dated August 24, 1953, and as a basis of their proceedings allege as follows:

1. Petitioners are individuals whose residence is c/o Mr. Ben Bisgeier, 9119 Sunset Boulevard, Los Angeles 46, California. The return for all of the periods here involved was a joint return of petitioners, as husband and wife, and were filed with the Collector of Internal Revenue for the Sixth District of California.

2. The Notice of Deficiency (a copy of which is attached and marked Exhibit "A") was mailed to petitioners on August 24, 1953.

3. The deficiencies as determined by the Commissioner are in income taxes as follows:

| Year | | Deficiency |
|------|------------|------------|
| 1949 | Income Tax | \$1,340.00 |
| 1950 | Income Tax | 7,835.92 |
| | | <hr/> |
| | | \$9,175.92 |

Of said amounts, the sum of \$7,835.92, representing the deficiency for the year 1950, is in dispute.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) Respondent erred with respect to the taxable year 1950 in determining that long term capital gains received by petitioners in said year in respect of the liquidation of Lawrence Land Co. were understated in petitioners' Federal income tax return for said year by \$7,650.98, and in failing to determine that petitioners overstated their long term capital gains in respect of said liquidation by \$6,238.34.

(b) Respondent erred with respect to the taxable year 1950 in determining that long term capital gains received by petitioners in said year in respect of the liquidation of Whittier Development Co. were understated in petitioners' Federal income tax return for said year by \$5,893.80, and in failing to determine that petitioners overstated their long term capital gains in respect of said liquidation by \$3,464.72.

(c) Respondent erred with respect to the taxable year 1950 in determining that long term capital gains received by petitioners in said year in respect of the liquidation of Rex Land Co. were understated in petitioners' Federal income tax return for said year by \$3,566.34.

(d) Respondent erred with respect to the taxable year 1950 in determining that long term capital gains received by petitioners in said year in respect of the liquidation of J. Richard Co. were understated in petitioners' Federal income tax return for said year by \$8,854.74.

5. The facts upon which petitioners rely as a basis for this proceeding, are as follows:

(a) All of the transactions here involved were those of petitioner, Myron P. Beck, and for convenience the term "petitioner" as hereinafter used in this paragraph will refer to petitioner, Myron P. Beck.

(b) On or about May 26, 1949, petitioner purchased 50 shares for the sum of \$5,000.00, and on or about June 30, 1949, purchased 25 shares for the sum of \$2500.00 of the stock of Lawrence Land Co. (hereinafter referred to as "Lawrence"). Said 75 shares represented 50% of all of the stock of Lawrence issued and outstanding at all times material hereto.

(c) Lawrence was a corporation incorporated pursuant to the laws of the State of California on or about March 25, 1949, and on that date commenced to do business within the State of California.

(d) Lawrence's business consisted of the subdivision of unimproved land into residential lots, including the installation of subdivision improvements, the erection of residences or homes upon such lots, and the sale thereof.

(e) On December 31, 1950, Lawrence was finally wound up and dissolved, and on or about said date its assets were distributed to its stockholders proportionately to their stock holdings.

(f) Pursuant to the winding up and complete liquidation of Lawrence petitioner received as his proportion of the assets of Lawrence the sum of \$97,978.00 in cash, and an undivided 50% interest in certain real property in the County of Los Angeles, State of California, which undivided interest had a then fair market value of \$37,300.00. There was also assigned to petitioner, in connection with said liquidation, a 50% interest in a certain contract, dated January 25, 1950, as amended February 9, 1950, between Lawrence and San Gabriel Valley Water Company (hereinafter referred to as "San Gabriel").

(g) In connection with the dissolution of Lawrence, petitioner and the other stockholders of Lawrence entered into a written agreement on December 26, 1950, in which said stockholders assumed and became responsible for all of the debts, obligations and liabilities of Lawrence. Said agreement was entered into in order to comply with sections 5000 and 5001 of the Corporations Code of the State of California pertaining to voluntary dissolutions of corporations.

(h) The undisputed amount of Lawrence's liability under the Excess Profits Tax Act of 1950, as of the time of its dissolution, was \$12,476.68, and petitioner's obligation in respect thereof, pursuant to his assumption of liability under the agreement referred to in paragraph 5 (g) above, amounted to \$6,238.34. Petitioner's accountant, at the time he prepared petitioner's 1950 Federal income tax return, failed to take into account said sum of \$6,238.34 so assumed by petitioner and accordingly, overstated petitioner's long term capital gain in respect of the dissolution of Lawrence by the sum of \$6,238.34.

(i) At all times material hereto San Gabriel was engaged in the business of supplying water to residences and other properties located in the district in which the tract of real property of Lawrence was situated.

(j) Pursuant to said contract, San Gabriel agreed to extend its pipelines for the servicing of water to Lawrence's property upon payment to it by Lawrence of the sum of \$31,021.00.

(k) Said contract further provided for contingent refunds to Lawrence by San Gabriel of all, or a portion, of the said sum of \$31,021.00 up to the whole thereof.

(l) By the terms of said contract, the aggregate amount of such refunds, if any, was dependent upon the amount of gross revenue, if any, which San Gabriel might receive, within a limited period of time, from the sale of water to consumers within the tract being developed by Lawrence.

(m) At all times material hereto, neither Lawrence nor San Gabriel had any control over any purchases of water which such consumers might make from San Gabriel.

(n) On or about July 11, 1949, petitioner purchased 500 shares of the stock of Whittier Development Co. (hereinafter referred to as "Whittier") for the sum of \$5,000.00. On or about April 22, 1950, petitioner sold 100 of said shares for \$1,000.00, and thereafter and until the dissolution of Whittier owned 400 shares thereof. Said 400 shares represented 40% of all of the stock of Whittier issued and outstanding at all times material hereto.

(o) Whittier was a corporation incorporated pursuant to the laws of the State of California on or about August 20, 1948, and during the month of July of 1949 commenced to do business within the State of California.

(p) Whittier's business consisted of the subdivision of unimproved land into residential lots, including the installation of subdivision improvements, the erection of residences or homes upon such lots, and the sale thereof.

(q) On December 28, 1950, Whittier was finally wound up and dissolved, and on or about said date, its assets were distributed to its stockholders proportionately to their stock holdings.

(r) Pursuant to the winding up and complete liquidation of Whittier petitioner received as his proportion of the assets of Whittier the sum of \$77,160.27 in cash. There was also assigned to petitioner, in connection with said liquidation, a 40%

interest in a certain contract, dated November 29, 1949, between Whittier and San Gabriel, and a 40% interest in a certain contract, dated March 10, 1950, between Whittier and San Gabriel.

(s) In connection with the dissolution of Whittier, petitioner and the other stockholders of Whittier entered into a written agreement on December 16, 1950, in which said stockholders assumed and became responsible for all of the debts, obligations and liabilities of Whittier. Said agreement was entered into in order to comply with sections 5000 and 5001 of the Corporations Code of the State of California pertaining to voluntary dissolutions of corporations.

(t) The undisputed amount of Whittier's liability under the Excess Profits Tax Act of 1950, as of the time of its dissolution, was \$8,661.79, and petitioner's obligation in respect thereof, pursuant to his assumption of liability under the agreement referred to in paragraph 5(s) above, amounted to \$3,464.72. Petitioner's accountant, at the time he prepared petitioner's 1950 Federal income tax return, failed to take into account said sum of \$3,464.72 so assumed by petitioner and accordingly, overstated petitioner's long term capital gain in respect of the dissolution of Whittier by the sum of \$3,464.72.

(u) At all times material hereto San Gabriel was engaged in the business of supplying water to residences and other properties located in the district in which the tracts of real property of Whittier were situated.

(v) Pursuant to the contract dated November 29, 1949, San Gabriel agreed to extend its pipelines for the servicing of water to one of the tracts being developed by Whittier upon the payment to it by Whittier of the sum of \$23,841.00.

(w) In said contract it further provided for contingent refunds to Whittier by San Gabriel of all, or a portion, of the said sum of \$23,841.00.

(x) Pursuant to the contract dated March 10, 1950, San Gabriel agreed to extend its pipelines for the servicing of water to another of the tracts being developed by Whittier upon payment to it by Whittier of the sum of \$5,214.00.

(y) Said contract further provided for contingent refunds to Whittier by San Gabriel of all, or a portion, of the said sum of \$5,214.00.

(z) By the terms of said contracts, the aggregate amounts of such refunds, if any, were dependent upon the amount of gross revenue, if any, which San Gabriel might receive, within a limited period of time, from the sale of water to consumers within the tracts being developed by Whittier.

(aa) At all times material hereto, Whittier had no control over any purchases of water which such consumers might make from San Gabriel.

(bb) On or about February 8, 1949, petitioner purchased 50 shares of the stock of Rex Land Co. (hereinafter referred to as "Rex") for the sum of \$5,000.00. Said 50 shares represented 50% of all of the stock of Rex issued and outstanding at all times material hereto.

(cc) Rex was a corporation incorporated pursu-

ant to the laws of the State of California on or about February 4, 1949, and on that date commenced to do business within the State of California.

(dd) Rex's business consisted of the subdivision of unimproved land into residential lots, including the installation of subdivision improvements, the erection of residences or homes upon such lots, and the sale thereof.

(ee) On November 8, 1950, Rex was finally wound up and dissolved, and on or about said date its assets were distributed to its stockholders proportionately to their stock holdings.

(ff) Pursuant to the winding up and complete liquidation of Rex petitioner received as his proportion of the assets of Rex the sum of \$1,158.84 in cash, and an undivided 50% interest in certain real property in the County of Los Angeles, State of California, which undivided interest had a then fair market value of \$118,000.00. There was also assigned to petitioner, in connection with said liquidation, a 50% interest in a certain contract, dated February 3, 1949, between Albert Gersten and San Gabriel. Albert Gersten had executed said contract in his own name but for the benefit of Rex and subsequently, in February of 1949, assigned said contract to Rex.

(gg) At all times material hereto San Gabriel was engaged in the business of supplying water to residences and other properties located in the district in which the tract of real property of Rex was situated.

(hh) Pursuant to said contract, San Gabriel agreed to extend its pipelines for the servicing of water to Rex's property upon payment to it by Rex of the sum of \$14,707.20.

(ii) Said contract further provided for contingent refunds to Rex by San Gabriel of all, or a portion, of the said sum of \$14,707.20.

(jj) By the terms of said contract, the aggregate amount of said refunds, if any, was dependent upon the amounts of gross revenue, if any, which San Gabriel might receive, within a limited period of time, from the sale of water to consumers within the tract being developed by Rex.

(kk) At all times material hereto, Rex had no control over any purchases of water which such consumers might make from San Gabriel.

(ll) On or about July 10, 1947, petitioner purchased 1005 shares of the common stock of J. Richard Co. (hereinafter referred to as "Richard") for the sum of \$10,050.00. Said 1005 shares represented 50% of all of the common stock of Richard issued and outstanding at all times material hereto.

(mm) Richard was a corporation incorporated pursuant to the laws of the State of California on or about July 10, 1947, and on that date commenced to do business within the State of California.

(nn) Richard's business consisted of the subdivision of unimproved land into residential lots, including the installation of subdivision improvements, the erection of residences or homes upon such lots, and the sale thereof.

(oo) On June 22, 1950, Richard was finally

wound up and dissolved, and on or about said date its assets were distributed to its stockholders proportionately to their stock holdings.

(pp) Pursuant to the winding up and complete liquidation of Richard petitioner received as his proportion of the assets of Richard the sum of \$38,202.12 in cash. There was also assigned to petitioner, in connection with said liquidation, a 50% interest in a certain contract, dated November 21, 1947, between Albert Gersten and San Gabriel, and a 50% interest in a certain contract, dated November 30, 1948, between Albert Gersten and San Gabriel. Albert Gersten had executed said contracts in his own name, but for the benefit of Richard, and subsequently, in November 1947 and December 1948 respectively, Gersten assigned said contracts to Richard.

(qq) At all times material hereto San Gabriel was engaged in the business of supplying water to residences and other properties located in the district in which the tracts of real property of Richard were situated.

(rr) Pursuant to the contract dated November 21, 1947, San Gabriel agreed to extend its pipelines for the servicing of water to one of the tracts being developed by Richard upon the payment to it by Richard of the sum of \$23,764.00.

(ss) Said contract further provided for contingent refunds to Richard by San Gabriel of all, or a portion, of the said sum of \$23,764.00.

(tt) Pursuant to the contract dated November

30, 1948, San Gabriel agreed to extend its pipelines for the servicing of water to one of the tracts being developed by Richard upon the payment to it by Richard of the sum of \$15,258.00.

(uu) Said contract further provided for contingent refunds to Richard by San Gabriel of all, or a portion, of the said sum of \$15,258.00.

(vv) By the terms of said contracts, the aggregate amounts of such refunds, if any, were dependent upon the amount of gross revenue, if any, which San Gabriel might receive, within a limited period of time, from the sale of water to consumers within the tracts being developed by Richard.

(ww) At all times material hereto, Richard had no control over any purchases of water which such consumers might make from San Gabriel.

(xx) Petitioner alleges that if the foregoing allegations set forth in paragraph 5, subparagraphs (h) and (t) above, with respect to the overstatement of long term capital gains for the taxable year 1950, together with the remaining allegations with respect to said taxable year, are determined to be correct, petitioner will be entitled to a refund with respect to said year 1950 based upon an over-assessment in the amount of at least \$2,425.76.

Wherefore, petitioners pray that this Court may hear the proceedings and determine that no deficiency is due from these petitioners for the taxable year 1950, but that petitioners are entitled to a refund for the amount of at least \$2,425.76; and

that this Court grant such other general or special relief as may be by law provided.

/s/ JACOB SHEARER,

/s/ LEHMAN C. AARONS,

Counsel for Petitioners.

Duly Verified.

EXHIBIT "A"

Regional

1250 Subway Terminal Building

417 South Hill Street

Los Angeles 13, California

ARC-Ap:SF LA:90D:PAK

Aug. 24, 1953

Mr. Myron P. Beck

and Mrs. Ann H. Beck

Husband and Wife

c/o Mr. Ben Bisgeier

9119 Sunset Boulevard

Los Angeles 46, California

Dear Mr. and Mrs. Beck:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1949 and December 31, 1950 discloses a deficiency of \$9,175.92, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax

Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute, in duplicate, the enclosed form and forward it to the assistant Regional Commissioner, Appellate, 1250 Subway Terminal Building, 417 South Hill Street, Los Angeles 13, California. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. COLEMAN ANDREWS,

Commissioner of Internal Revenue,

/s/ By W. T. TIGNOR,

Associate Chief, Appellate Division.

PaKar:vme

Enclosures:

Statement

Form 1276

Agreement Form

Statement

ARC-Ap:SF LA:90D:PAK

Mr. Myron P. Beck and Mrs. Ann H. Beck, Husband and Wife,
c/o Mr. Ben Bisgeier, 9119 Sunset Boulevard, Los Angeles
46, California.

Tax Liability for the Taxable Years ended December 31, 1949
and December 31, 1950.

Year: 1949. Income Tax Deficiency: \$1,340.00.

Year: 1950. Income Tax Deficiency: \$7,835.92.

Total: \$9,175.92.

In making this determination of your income tax liability careful consideration has been given to the report of examination dated September 23, 1952, to your protest dated November 6, 1952, and to the statements made at a hearing held on January 27, 1953.

A copy of this letter and statement has been mailed to your representative, Mr. Jacob Shearer, 6535 Wilshire Boulevard, Los Angeles 48, California, in accordance with the authorization contained in the power of attorney executed by you.

Adjustment to Net Income

Taxable Year Ended December 31, 1949

Net income as disclosed by return \$55,660.19

Unallowable deduction:

(a) Entertainment and promotion expense disallowed 2,456.00

Net income adjusted \$58,116.19

Explanation of Adjustment

(a) Included in the deductions claimed for entertainment and promotion expenses are items aggregating \$2,456.00 which have not been substantiated as proper deductions under section 23 (a) of the Internal Revenue Code and are disallowed.

Computation of Tax

Taxable Year Ended December 31, 1949

Net income adjusted \$58,116.19

Less: Exemptions 1,200.00

Balance subject to normal tax and surtax \$56,916.19

One-half of \$56,916.19 \$28,458.10

Tentative surtax \$11,410.28

Tentative normal tax 853.74

Total tentative tax \$12,264.02

Less: Reduction under section 12 (c)

| | |
|--|-------------|
| I.R.C. | 1,491.68 |
| Total normal tax and surtax on one-half of net income | \$10,772.34 |
| Combined normal tax and surtax ($\$10,772.34 \times 2$) | \$21,544.68 |
| Correct income tax liability | \$21,544.68 |
| Income tax liability shown by return, account No. | |
| 3201028 | 20,204.68 |
| Deficiency of income tax | \$ 1,340.00 |

Adjustments to Net Income

Taxable Year Ended December 31, 1950

| | |
|---|--------------|
| Net income as disclosed by return | \$213,638.49 |
| Additional income and unallowable deductions: | |
| (a) Long-term capital gain | 12,982.93 |
| (b) Taxes disallowed | 60.00 |
| (c) Promotion and entertainment expense | 2,620.00 |
| Total | \$229,301.42 |
| Reduction: | |
| (d) Income from partnership | 41.75 |
| Net income adjusted | \$229,259.67 |

Explanation of Adjustments

(a) In your income tax return for the taxable year ended December 31, 1950 you reported capital gains from the liquidation of certain corporations. Among the assets received were valuable water contracts for which no value was reported in computing the amount of capital gain shown by your return. It is determined that the fair market value of such contracts is properly includible, under the provisions of section 117 of the Internal Revenue Code, in computing the amount of capital gain realized from the liquidation of such corporations.

It is determined that the fair market value of your share of such contracts, received by you from the corporations mentioned, are the amounts shown in the following:

| Name of Corporation | Amount |
|-------------------------------|-------------|
| Lawrence Land Co. | \$7,650.98 |
| Whittier Development Co. | 5,515.80 |
| Rex Land Co. | 3,439.54 |
| J. Richard Co. | 8,854.74 |
| Total | \$25,461.06 |

In addition to the foregoing it is determined that you received as your distributable share of the assets of Whittier Development Co. the amount of \$378.00 representing a refundable deposit and the amount of \$126.80 representing your share of a claim for refund of state taxes.

Taking the foregoing into account it is determined that the correct amount of long-term capital gain realized by you during this taxable year is \$184,107.55 instead of the amount, \$171,124.62, reported in your return, or an increase of \$12,982.93. The amount of such increase is determined as shown in the following:

| | |
|-----------------------------------|-------------|
| Value of water contracts | \$25,461.06 |
| Value of refundable deposit | 378.00 |
| Value of state tax claim | 126.80 |
| <hr/> | |
| Total increase | \$25,965.86 |
| Long-term capital gain—50% | \$12,982.93 |

(b) It is determined that the correct amount of the deduction for unemployment insurance is \$30.00 instead of the amount, \$90.00, claimed in your return, or a decrease of \$60.00.

(c) Included in the deductions claimed for promotion and entertainment expenses are items aggregating \$2,620.00 which have not been substantiated as proper deductions under section 23 (a) of the Internal Revenue Code and are disallowed.

(d) It is determined that the correct amount of your distributive share of the net loss of the partnership, Superior Building Co., is \$193.89 instead of the amount of such loss, \$152.14, reported in your return, or an increase of \$41.75.

Computation of Alternative Tax

Taxable Year Ended December 31, 1950

| | |
|--|--------------|
| Net income adjusted | \$229,259.67 |
| Less: Excess of net long-term capital gain over net short-term capital loss | 184,107.55 |
| <hr/> | |
| Ordinary net income | \$ 45,152.12 |
| Less: Exemptions | 1,200.00 |
| <hr/> | |
| Balance, subject to surtax and normal tax | \$ 43,952.12 |

| | |
|--|--------------|
| One-half of \$43,952.12 | \$ 21,976.06 |
| Tentative surtax | \$7,707.31 |
| Tentative normal tax at 3%..... | 659.28 |
| | <hr/> |
| Total | \$8,366.59 |
| Less reduction under Sec. 12 (c), I.R.C. | 768.99 |
| | <hr/> |
| Partial tax on one-half of net income | \$ 7,597.60 |
| Combined partial tax (\$7,597.60 x 2) | \$ 15,195.20 |
| Plus: 50 per cent of \$184,107.55 | 92,053.77 |
| | <hr/> |
| Combined alternative tax | \$107,248.97 |

Computation of Tax

Taxable Year Ended December 31, 1950

| | |
|---|--------------|
| Net income adjusted | \$229,259.67 |
| Less: Exemptions | 1,200.00 |
| | <hr/> |
| Balance, subject to surtax and normal tax | \$228,059.67 |
| One-half of \$228,059.67 | \$114,029.84 |
| Tentative surtax | \$76,385.66 |
| Tentative normal tax at 3% | 3,420.00 |
| | <hr/> |
| Total | \$79,805.66 |
| Less reduction under Sec. 12 (c), I.R.C. | 7,198.51 |
| | <hr/> |
| Total normal tax and surtax on one-half of net income | \$ 72,607.15 |
| Combined normal tax and surtax (\$72,607.15 x 2).... | \$145,214.30 |
| Combined alternative tax | \$107,248.97 |
| Correct income tax liability | \$107,248.97 |
| Income tax liability shown on return, account No. 5—315091 | 99,413.05 |
| | <hr/> |
| Deficiency of income tax | \$ 7,835.92 |

Served Nov. 13, 1953.

[Endorsed]: T.C.U.S. Filed Nov. 12, 1953.

[Title of Tax Court and Docket No. 51228.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, for answer to the petition of the above-named taxpayers, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4. (a) to (d), inclusive. Denies the allegations of error contained in subparagraphs (a) to (d), inclusive, of paragraph 4 of the petition.

5. (a) to (e), inclusive. Admits the allegations contained in subparagraphs (a) to (e), inclusive, of paragraph 5 of the petition.

(f), (g) and (h). Denies the allegations contained in subparagraphs (f), (g) and (h) of paragraph 5 of the petition.

(i), (j) and (k). Admits the allegations contained in subparagraphs (i), (j) and (k) of paragraph 5 of the petition.

(l) and (m). Denies the allegations contained in subparagraphs (l) and (m) of paragraph 5 of the petition.

(n) to (q), inclusive. Admits the allegations contained in subparagraphs (n) to (q), inclusive, of paragraph 5 of the petition.

(r), (s) and (t). Denies the allegations contained in subparagraphs (r), (s) and (t) of paragraph 5 of the petition.

(u) to (y), inclusive. Admits the allegations contained in subparagraphs (u) to (y), inclusive, of paragraph 5 of the petition.

(z) and (aa). Denies the allegations contained in subparagraphs (z) and (aa) of paragraph 5 of the petition.

(bb) to (ee), inclusive. Admits the allegations contained in subparagraphs (bb) to (ee), inclusive, of paragraph 5 of the petition.

(ff) Denies the allegations contained in subparagraph (ff) of paragraph 5 of the petition.

(gg), (hh) and (ii). Admits the allegations contained in subparagraphs (gg), (hh) and (ii) of paragraph 5 of the petition.

(jj) and (kk). Denies the allegations contained in subparagraphs (jj) and (kk) of paragraph 5 of the petition.

(ll) to (oo), inclusive. Admits the allegations contained in subparagraphs (ll) to (oo), inclusive, of paragraph 5 of the petition.

(pp). Denies the allegations contained in subparagraph (pp) of paragraph 5 of the petition.

(qq) to (uu), inclusive. Admits the allegations contained in subparagraphs (qq) to (uu), inclusive, of paragraph 5 of the petition.

(vv), (ww) and (xx). Denies the allegations contained in subparagraphs (vv), (ww) and (xx) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ DANIEL A. TAYLOR, REM,
Chief Counsel, Internal
Revenue Service.

Of Counsel: Woolvin Patten, Acting Regional Counsel, E. C. Crouter, Associate Appellate Counsel, R. E. Maiden, Jr., Assistant Appellate Counsel, Clayton J. Burrell, Special Attorney, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed Jan. 6, 1954.

[Title of Tax Court and Docket No. 51229.]

PETITION

The above named petitioners hereby petition for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his Notice of Deficiency dated August 24, 1953, and as a basis of their proceedings allege as follows:

1. Petitioners are individuals whose residence is 11468 Allerton, Whittier, California. The return for the period here involved was a joint return of petitioners, as husband and wife, and was filed with the Collector of Internal Revenue for the Sixth District of California.

2. The Notice of Deficiency (a copy of which is attached and marked Exhibit "A") was mailed to petitioners on August 24, 1953.

3. The deficiency as determined by the petition was for income taxes for the year 1950 in the sum

of \$1,984.73. The entire amount of said deficiency is in dispute.

4. The determination of tax set forth in the said Notice of Deficiency is based upon the following errors:

(a) Respondent erred in determining that the long term capital gains received by petitioners in respect of the liquidation of Lawrence Land Co. was understated in petitioners' Federal income tax return for said year by the sum of \$1719.20, and in failing to determine that petitioners overstated their long term capital gains in respect to said liquidation by the sum of \$1247.67.

(b) Respondent erred with respect to the taxable year 1950 in determining that long term capital gains received by petitioners in said year in respect of the liquidation of Whittier Development Co. were understated in petitioners' Federal income tax return for said year by \$2757.90, and in failing to determine that petitioners overstated their long term capital gains in respect of said liquidation by \$1732.35.

5. The facts upon which petitioners rely as a basis for this proceeding, are as follows:

(a) All of the transactions here involved were those of petitioner, Milton Gersten, as the managing spouse of the community property of the parties, and for convenience the term "petitioner" as hereinafter used in this paragraph will refer to petitioner, Milton Gersten.

(b) On or about May 26, 1949 petitioner purchased for the sum of \$1500. a total of 15 shares of the stock of Lawrence Land Co. (hereinafter referred to as "Lawrence"). Said 15 shares represented 10% of all of the stock of Lawrence issued and outstanding at all times material hereto.

(c) Lawrence was a corporation incorporated pursuant to the laws of the State of California on or about March 25, 1949, and on that date commenced to do business within the State of California.

(d) Lawrence's business consisted of the subdivision of unimproved land into residential lots, including the installation of subdivision improvements, the erection of residences or homes upon such lots, and the sale thereof.

(e) On December 31, 1950, Lawrence was finally wound up and dissolved, and on or about said date its assets were distributed to its stockholders proportionately to their stock holdings.

(f) Pursuant to the winding up and complete liquidation of Lawrence petitioner received as his proportion of the assets of Lawrence the sum of \$19,595.60 in cash, and an undivided 10% interest in certain real property in the County of Los Angeles, State of California, which undivided interest had a then fair market value of \$7,460.00. There was also assigned to petitioner, in connection with said liquidation a 10% interest in a certain contract, dated January 25, 1950, as amended February 9, 1950, between Lawrence and San Gabriel Valley

Water Company (hereinafter referred to as "San Gabriel").

(g) In connection with the dissolution of Lawrence, petitioner and the other stockholders of Lawrence entered into a written agreement on December 26, 1950, in which said stockholders assumed and became responsible for all of the debts, obligations and liabilities of Lawrence. Said agreement was entered into in order to comply with sections 5000 and 5001 of the Corporations Code of the State of California pertaining to voluntary dissolutions of corporations.

(h) The undisputed amount of Lawrence's liability under the Excess Profits Tax Act of 1950, as amended, as of the time of its dissolution, was \$12,476.68, and petitioner's obligation in respect thereof, pursuant to his assumption of liability under the agreement referred to in paragraph 5 (g) above, amounted to \$1,247.67. Petitioner's accountant, at the time he prepared Petitioner's 1950 Federal income tax return, failed to take into account said sum of \$1,247.67 so assumed by petitioner and accordingly, overstated petitioner's long term capital gains in respect of the dissolution of Lawrence by the sum of \$1,247.67.

(i) At all times material hereto San Gabriel was engaged in the business of supplying water to residences and other properties located in the district in which the tract of real property of Lawrence was situated.

(j) Pursuant to said contract, San Gabriel

agreed to extend its pipelines for the servicing of water to Lawrence's property upon payment to it by Lawrence of the sum of \$31,021.00.

(k) Said contract further provided for contingent refunds to Lawrence by San Gabriel of all, or a portion, of the said sum of \$31,021.00 up to the whole thereof.

(l) By the terms of said contract, the aggregate amount of such refunds, if any, was dependent upon the amount of gross revenue, if any, which San Gabriel might receive, within a limited period of time, from the sale of water to consumers within the tract being developed by Lawrence.

(m) At all times material hereto, neither Lawrence nor San Gabriel had any control over any purchases of water which such consumers might make from San Gabriel.

(n) On or about the month of May, 1949, petitioner purchased 200 shares of stock of Whittier Development Co. (hereinafter referred to as "Whittier") for the sum of \$2,000.00 and thereafter and until the dissolution of Whittier owned said 200 shares. Said 200 shares represented 20% of all of the stock of Whittier issued and outstanding at all times material hereto.

(o) Whittier was a corporation incorporated pursuant to the laws of the State of California on or about August 20, 1948, and during the month of July of 1949 commenced to do business within the State of California.

(p) Whittier's business consisted of the subdivi-

sion of unimproved land into residential lots, including the installation of subdivision improvements, the erection of residences or homes upon such lots, and the sale thereof.

(q) On December 28, 1950, Whittier was finally wound up and dissolved, and on or about said date, its assets were distributed to its stockholders proportionately to their stock holdings.

(r) Pursuant to the winding up and complete liquidation of Whittier petitioner received as his proportion of the assets of Whittier the sum of \$38,580.13 in cash. There was also assigned to petitioner, in connection with said liquidation, a 20% interest in a certain contract, dated November 29, 1949, between Whittier and San Gabriel, and a 20% interest in a certain contract, dated March 10, 1950, between Whittier and San Gabriel.

(s) In connection with the dissolution of Whittier, petitioner and the other stockholders of Whittier entered into a written agreement on December 16, 1950, in which said stockholders assumed and became responsible for all of the debts, obligations and liabilities of Whittier. Said agreement was entered into in order to comply with sections 5000 and 5001 of the Corporations Code of the State of California pertaining to voluntary dissolutions of corporations.

(t) The undisputed amount of Whittier's liability under the Excess Profits Tax Act of 1950, as amended, as of the time of its dissolution, was \$8,661.79, and petitioner's obligation in respect

thereof, pursuant to his assumption of liability under the agreement referred to in paragraph 5 (s) above, amounted to \$1,732.35. Petitioner's accountant, at the time he prepared petitioner's 1950 Federal income tax return, failed to take into account said sum of \$1,732.35 so assumed by petitioner and accordingly, overstated petitioner's long term capital gain in respect of the dissolution of Whittier by the sum of \$1,732.35.

(u) At all times material hereto San Gabriel was engaged in the business of supplying water to residences and other properties located in the district in which the tracts of real property of Whittier were situated.

(v) Pursuant to the contract dated November 29, 1949. San Gabriel agreed to extend its pipelines for the servicing of water to one of the tracts being developed by Whittier upon the payment to it by Whittier of the sum of \$23,841.00.

(w) In said contract it further provided for contingent refunds to Whittier by San Gabriel of all, or a portion, of the said sum of \$23,841.00.

(x) Pursuant to the contract dated March 10, 1950, San Gabriel agreed to extend its pipelines for the servicing of water to another of the tracts being developed by Whittier upon payment to it by Whittier of the sum of \$5,214.00.

(y) Said contract further provided for contingent refunds to Whittier by San Gabriel of all, or a portion, of the said sum of \$5,214.00.

(z) By the terms of said contracts, the aggregate amounts of such refunds, if any, were dependent upon the amount of gross revenue, if any, which San Gabriel might receive, within a limited period of time, from the sale of water to consumers within the tracts being developed by Whittier.

(aa) At all times material hereto, Whittier had no control over any purchases of water which such consumers might make from San Gabriel.

(bb) Petitioner alleges that if the foregoing allegations set forth in paragraph 5, subparagraphs (h) and (t) above, with respect to the overstatement of long term capital gains for the taxable year 1950, together with the remaining allegations with respect to said taxable year, are determined to be correct, petitioners will be entitled to a refund with respect to said year based upon an overassessment in the amount of at least \$745.00.

Wherefore, petitioners pray that this Court may hear the proceedings and determine that no deficiency is due from these petitioners for the taxable year 1950, but that petitioners are entitled to a refund for the said taxable year based upon an overassessment in the amount of at least \$745.00; and that this Court grant such other general or special relief as may be by law provided.

/s/ JACOB SHEARER,

/s/ LEHMAN C. AARONS,

Counsel for Petitioner.

Duly Verified.

EXHIBIT "A"

Regional

1250 Subway Terminal Building

417 South Hill Street

Los Angeles 13, California

ARC-Ap:SF LA:90D:PAK

Aug. 24, 1953

Mr. Milton Gersten
and Mrs. Mary Gersten
Husband and Wife
11468 Allerton
Whittier, California

Dear Mr. and Mrs. Gersten:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1950 discloses a deficiency of \$1,984.73, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise, Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute, in duplicate, the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, 1250 Subway Terminal Building, 417 South Hill Street, Los Angeles 13, California. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. COLEMAN ANDREWS,

Commissioner of Internal Revenue,

/s/ By W. T. TIGNOR,

Associate Chief, Appellate Division.

PAKar:lee

Enclosures:

Statement

Form 1276

Agreement Form

Statement

ARC-Ap:SF LA:90D:PAK

Mr. Milton Gersten and Mrs. Mary Gersten, Husband and Wife,
11468 Allerton, Whittier, California.

Tax Liability for the Taxable Year Ended December 31, 1950.
Year: 1950. Income Tax Deficiency: \$1,984.73.

In making this determination of your income tax liability careful consideration has been given to the report of examination.

dated September 23, 1952, to your protest dated November 6, 1952, and to the statements made at a hearing held on January 27, 1953.

A copy of this letter and statement has been mailed to your representative, Mr. Jacob Shearer, 6535 Wilshire Boulevard, Los Angeles 48, California, in accordance with the authorization contained in the power of attorney executed by you.

Adjustments to Net Income

Taxable Year Ended December 31, 1950

| | |
|---|--------------------|
| Net income as disclosed by return | \$81,634.10 |
| Additional income and unallowable deductions: | |
| (a) Long-term capital gain | 2,238.55 |
| (b) Taxes disallowed | 15.00 |
| (c) Entertainment expense disallowed | 1,596.95 |
| Net income adjusted | <u>\$85,484.60</u> |

Explanation of Adjustments

(a) In your income tax return for the taxable year ended December 31, 1950, you reported capital gains from the liquidation of certain corporations. Among the assets received were valuable water contracts for which no value was reported in computing the amount of capital gain shown by your return. It is determined that the fair market value of such contracts is properly includible, under the provisions of Section 117 of the Internal Revenue Code, in computing the amount of capital gain realized from the liquidation of such corporations.

It is determined that the fair market value of your share of such contracts, received by you from the corporations mentioned, are the amounts shown in the following:

| Name of Corporation | Amount |
|-------------------------------|-------------------|
| Lawrence Land Co. | \$1,530.20 |
| Whittier Development Co. | 2,757.90 |
| Total | <u>\$4,288.10</u> |

It is also determined that you received the amount of \$189.00 as your distributive share of a refundable deposit with Southern California Edison Company upon the liquidation of Whittier Development Co., which amount was not reported in your return.

Taking the foregoing into account the increase in the amount of long-term capital gain realized during this taxable year is determined as shown in the following:

Increases:

| | | |
|---|------------|------------|
| Value of water contracts | \$4,288.10 | |
| Value of refundable deposit | 189.00 | |
| | | <hr/> |
| Total | \$4,477.10 | |
| Increase of long-term capital gain (50% of \$4,477.10) | | \$2,238.55 |

(b) It is determined that the correct deduction for social security taxes is the amount of \$30.00 instead of the amount, \$45.00, claimed in your return or a decrease of \$15.00.

(c) Included in the deduction claimed for entertainment expense are items aggregating \$1,596.95 which have not been substantiated as proper deductions under Section 23(a) of the Internal Revenue Code and are disallowed.

Computation of Alternative Tax

Taxable Year Ended December 31, 1950

| | | |
|--|-------------|-------|
| Net income adjusted | \$85,484.60 | |
| Less: Excess of net long-term capital gain over net short-term capital loss | 33,262.96 | |
| | | <hr/> |
| Ordinary net income | \$52,221.64 | |
| Less: Exemptions | 3,000.00 | |
| | | <hr/> |
| Balance, subject to surtax and normal tax | \$49,221.64 | |
| One-half of \$49,191.64 | | |
| Tentative surtax | \$9,182.06 | |
| Tentative normal tax at 3% | 738.32 | |
| | | <hr/> |
| Total | \$9,920.38 | |
| Less reduction under Sec. 12 (c), I.R.C. | 908.83 | |
| | | <hr/> |
| Partial tax on one-half of net income | \$ 9,011.55 | |
| Combined partial tax (\$9,011.55 x 2) | \$18,023.10 | |
| Plus: 50 per cent of \$33,262.96 | 16,631.48 | |
| | | <hr/> |
| Combined alternative tax | \$34,654.58 | |

Computation of Tax

Taxable Year Ended December 31, 1950

| | |
|--|-------------|
| Net income adjusted | \$85,484.60 |
| Less: Exemptions | 3,000.00 |
| <hr/> | |
| Balance, subject to surtax and normal tax | \$82,484.60 |
| One-half of \$82,484.60 | \$41,242.30 |
| Tentative surtax | \$19,359.92 |
| Tentative normal tax at 3% | 1,237.27 |
| <hr/> | |
| Total | \$20,597.19 |
| Less reduction under Sec. 12 (c), I.R.C. | 1,869.75 |
| <hr/> | |
| Total normal tax and surtax on one-half of net income | \$18,727.44 |
| Combined normal tax and surtax ($\$18,727.44 \times 2$) | \$37,454.88 |
| Combined alternative tax | \$34,654.58 |
| Correct income tax liability | \$34,654.58 |
| Income tax liability shown on return, account No. 3251339 | 32,669.85 |
| <hr/> | |
| Deficiency of income tax | \$ 1,984.73 |

Served Nov. 13, 1953.

[Endorsed]: T.C.U.S. Filed Nov. 12, 1953.

[Title of Tax Court and Docket No. 51229.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, for answer to the petition of the above-named taxpayers, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4. (a) and (b). Denies the allegations of error

contained in subparagraphs (a) and (b) of paragraph 4 of the petition.

5. (a) to (e), inclusive. Admits the allegations contained in subparagraphs (a) to (e), inclusive, of paragraph 5 of the petition.

(f), (g) and (h). Denies the allegations contained in subparagraphs (f), (g) and (h) of paragraph 5 of the petition.

(i), (j) and (k). Admits the allegations contained in subparagraphs (i), (j) and (k) of paragraph 5 of the petition.

(l) and (m). Denies the allegations contained in subparagraphs (l) and (m) of paragraph 5 of the petition.

(n) to (q), inclusive. Admits the allegations contained in subparagraphs (n) to (q), inclusive, of paragraph 5 of the petition.

(r), (s) and (t). Denies the allegations contained in subparagraphs (r), (s) and (t) of paragraph 5 of the petition.

(u) to (y), inclusive. Admits the allegations contained in subparagraphs (u) to (y), inclusive, of paragraph 5 of the petition.

(z), (aa) and (bb). Denies the allegations contained in subparagraphs (z), (aa) and (bb) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ DANIEL A. TAYLOR, REM,
Chief Counsel, Internal
Revenue Service.

Of Counsel: Woolvin Patten, Acting Regional Counsel, E. C. Crouter, Associate Appellate Counsel, R. E. Maiden, Jr., Assistant Appellate Counsel, Clayton J. Burrell, Special Attorney, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed Jan. 6, 1954.

28 T. C. No. 84

Tax Court of the United States

Docket Nos. 51226-51242

Albert Gersten, et al.,¹ Petitioners, v. Commissioner of Internal Revenue, Respondent.

Filed June 28, 1957

FINDINGS OF FACT AND OPINION

1. Four corporations in which certain of the petitioners were stockholders were engaged in the business of subdividing tracts of land into lots and constructing and selling houses thereon. To procure the waterlines necessary to supply water for the houses so built and sold, the corporations, under

¹ Proceedings of the following petitioners are considered herewith: Albert Gersten and Lucille Gersten, Docket No. 51227; Myron P. Beck and Ann H.

contracts with the water company, paid the cost of the extension of the water company's lines into the various properties. For a period of ten years from the date of completion of the waterlines, the water company agreed to make payments to the corporations based on a percentage of the gross revenue it would derive from the sale of water to the occupants of the houses sold, but in an amount not to exceed cost to the corporations for the running of the waterlines. All of the houses were completed and sold, and the four corporations distributed in dissolution the water company contracts to their stockholders. In reporting their gain upon the sales of the houses, the four corporations treated the cost

Beck, Docket No. 51228; Milton Gersten and Mary Gersten, Docket No. 51229; Rex Land Co., a dissolved corporation, Docket No. 51230; Albert Gersten, alleged Transferee of Rex Land Co., Docket No. 51231; Myron P. Beck and Ann H. Beck, alleged Transferees of Rex Land Co., Docket No. 51232; Lawrence Land Co., a dissolved corporation, Docket No. 51233; Albert Gersten, alleged Transferee of Lawrence Land Co., Docket No. 51234; Myron P. Beck and Ann H. Beck, alleged Transferees of Lawrence Land Co., Docket No. 51235; Milton Gersten and Mary Gersten, alleged Transferees of Lawrence Land Co., Docket No. 51236; Albert Gersten, alleged Transferee of J. Richard Co., Docket No. 51237; Myron P. Beck and Ann H. Beck, alleged Transferees of J. Richard Co., Docket No. 51238; Whittier Development Co., a dissolved corporation, Docket No. 51239; Albert Gersten, alleged Transferee of Whittier Development Co., Docket No. 51240; Myron P. Beck and Ann H. Beck, alleged Transferees of Whittier Development Co., Docket No. 51241; and Milton Gersten and Mary Gersten, alleged Transferees of Whittier Development Co., Docket No. 51242.

to them of the waterlines as part of the cost of the houses sold, which treatment was disallowed by the respondent in the determinations herein. The stockholders, in reporting their gain upon dissolution of the corporations, attributed no value to the water company contracts distributed to them. The respondent determined that each of the contracts had a fair market value at the time of distribution and the amount thereof, and took such fair market value into account in determining the gain to the stockholders from the dissolution of the corporations. Held, that payments made by the corporations to the water company for the construction of the waterlines were properly included by corporations in computing the cost of the houses sold. *Colony, Inc.*, 26 T. C. 30. Held, further, that at the time of distribution each of the water company contracts had a fair market value equal, at least, to the amount determined by the respondent, and the respondent properly took such fair market value into account in determining the gain realized by the stockholders upon receipt of the contracts.

2. Petitioner Albert Gersten and one Robbins had been the owners, in equal part, of the stock of a corporation, the assets of which they had received in equal shares upon its dissolution, and by reason thereof, Gersten and Robbins became liable as transferees of the said corporation for \$44,721.60 in Federal taxes and interest thereon. In December 1947, Gersten paid \$40,000 of the said sum and on April 5, 1949, paid the remaining \$4,721.60, of which \$1,261.13 represented interest. At the time of

the final payment in April of 1949, Robbins was insolvent, and Gersten in his 1949 return deducted the entire \$4,721.60. The respondent in his determination of deficiency determined that the \$4,721.60 paid by Gersten was paid one-half on his own account and one-half on Robbins' account, that the \$2,360.80 paid on Robbins' account was a nonbusiness bad debt, deductible as a short-term capital loss under section 23 (k) of the Code, that of the \$2,360.80 paid on his own account, \$630.57 was interest and deductible as such, and the remaining \$1,730.23 was a long-term capital loss. Under authority of *Putnam v. Commissioner*, 352 U. S. 82, and *Arrowsmith v. Commissioner*, 344 U. S. 47, the respondent's determination is sustained.

3. On April 3, 1950, petitioner Lucille Gersten obtained a California interlocutory decree of divorce from petitioner Albert Gersten, which, under California law, did not become a final decree until April 3, 1951. On November 2, 1950, Albert Gersten obtained a final decree of divorce in Mexico and on that date married Bernice Ann Gersten in Mexico. He and Bernice filed a joint return for 1950; respondent determined they were not entitled to do so. Albert and Bernice Ann Gersten were at all times residents of California. Held, petitioner Albert Gersten and Bernice Ann Gersten were not entitled to file a joint return of income for 1950.

4. J. Richard Company, a California corporation incorporated on July 10, 1947, was engaged in the business of purchasing tracts of land which it subdivided into lots on which it constructed and

sold houses. It dissolved on June 22, 1950. Lawrence Land Company was a California corporation incorporated on March 25, 1949. It dissolved on December 31, 1950. It also was engaged in the business of acquiring tracts of land which it subdivided into lots on which it constructed and sold houses. Petitioners Albert Gersten and Myron P. Beck owned all of the stock of J. Richard Company. They and Milton Gersten owned all of the stock of Lawrence Land Company. Held, the business of J. Richard Company was substantially similar to the trade or business engaged in by Lawrence Land Company during 1950, within the meaning of section 430 (c) (2) (B) (ii) of the 1939 Code, and Lawrence Land Company was therefore in its fourth taxable year for purposes of such section in computing its excess profits tax liability for the fiscal period March 1, 1950 to December 31, 1950.

Jacob Shearer, Esq., for the petitioners.

George E. Constable, Esq., for the respondent.

The respondent determined income tax and transferee liability deficiencies against the petitioners herein as follows:

| Docket No. | Petitioner | Taxable Year | |
|------------|---------------------------------------|--------------|----------------------|
| | | or Period | Deficiency |
| 51226 | Albert Gersten | 1950 | \$10,429.15 |
| 51227 | Albert Gersten and Lucille Gersten | 1949 | 1,687.02 |
| 51228 | Myron P. Beck and Ann H. Beck | 1949 1950 | 1,340.00 7,835.92 |
| 51229 | Milton Gersten and Mary Gersten | 1950 | 1,984.73 |

| Docket No. | Petitioner | Taxable Year or Period | Deficiency |
|------------|---|--|-------------------------|
| 51230 | Rex Land Co., a dissolved corporation | Yr. ended 1/31/50 2/1/50—10/25/50 | 6,568.55 1,104.16 |
| 51231 | Albert Gersten, transferee of Rex Land Co. | Yr. ended 1/31/50 2/1/50—10/25/50 | 6,568.55 1,104.16 |
| 51232 | Myron P. Beck and Ann H. Beck, transferees of Rex Land Co. | Yr. ended 1/31/50 2/1/50—10/25/50 | 6,568.55 1,104.16 |
| 51233 | Lawrence Land Co., a dissolved corporation | 3/1/50—12/31/50 | 10,908.88 ² |
| 51234 | Albert Gersten, transferee of Lawrence Land Co. | 3/1/50—12/31/50 | 10,908.88 |
| 51235 | Myron P. Beck and Ann H. Beck, transferees of Lawrence Land Co. | 3/1/50—12/31/50 | 10,908.88 |
| 51236 | Milton Gersten and Mary Gersten, transferees of Lawrence Land Co. | 3/1/50—12/31/50 | 10,908.88 |
| 51237 | Albert Gersten, transferee of J. Richard Co. | Yr. ended 6/30/49 Yr. ended 6/30/50 | 10,886.75 5,306.59 |
| 51238 | Myron P. Beck and Ann H. Beck, transferees of J. Richard Co. | Yr. ended 6/30/49 Yr. ended 6/30/50 | \$10,886.75 5,306.59 |
| 51239 | Whittier Development Co., a dissolved corporation | Yr. ended 2/28/50 | 7,503.64 |

² Such amount is the determined net deficiency in income tax imposed by sections 13 and 15 of chapter I, the gross deficiency in such tax of \$15,202.94 being offset by an overpayment of excess profits tax imposed by section 430 of such chapter in the amount of \$4,294.06. *Union Telephone Co.*, 41 B.T.A. 152; cf. *Will County Title Co.*, 38 B.T.A. 1396; *Rowan Cotton Mills Co.*, 1 T. C. 865, *affd.* 140 F. 2d 277, *certiorari denied* 322 U. S. 740; *Pioneer Parachute Co.*, 4 T. C. 27; *Difco Laboratories, Inc.*, 10 T. C. 660.

| Docket No. | Petitioner | Taxable Year or Period | Deficiency |
|------------|---|---------------------------|------------|
| 51240 | Albert Gersten, transferee of Whittier Develop- ment Co. | Yr. ended 2/28/50 | 7,503.64 |
| 51241 | Myron P. Beck and Ann H. Beck, transferees of Whittier Development Co. | Yr. ended 2/28/50 | 7,503.64 |
| 51242 | Milton Gersten and Mary Gersten, transferees of Whittier Development Co. | Yr. ended 2/28/50 | 7,503.64 |

The petitioner transferees have conceded their liability as transferees in the amount of any deficiencies determined herein against the corporate petitioners in Docket Nos. 51230, 51233, and 51239. Petitioners Albert Gersten and Myron P. Beck have also conceded their transferee liability, determined in Docket Nos. 51237 and 51238, for such additional taxes as J. Richard Company, which is not a petitioner, should have been liable for, as may be determined herein. The parties agree that Ann H. Beck, the wife of Myron P. Beck and a petitioner in Docket Nos. 51232, 51235, 51238, and 51241, is not liable as a transferee of the corporate petitioners or of J. Richard Company.

The issues to be decided are (1) whether the corporate petitioners and another corporation, J. Richard Company, properly included payments to a water company for extending pipelines to certain subdivisions developed by them, in computing the cost of property sold, when such payments were repayable upon the happening of certain contingencies; (2) what value, if any, was attributable to the

said repayment rights in determining the gain realized by the stockholders upon distributions to them in liquidation of the said corporations; (3) whether a payment in 1949 by petitioner Albert Gersten, in final satisfaction of the Federal income tax liability of a dissolved corporation, half of whose assets he had received upon dissolution, resulted in a fully deductible loss under section 23 (e) (2) of the Internal Revenue Code of 1939; (4) whether petitioner Albert Gersten and his alleged wife, Bernice Anne Gersten, were entitled to file a joint Federal income tax return for the year 1950; and (5) whether the business of J. Richard Company was "substantially similar to the trade or business" engaged in by petitioner Lawrence Land Company during the year 1950, within the meaning of section 430 (e) (2) (B) (ii).³

Findings of Fact

Some of the facts have been stipulated and are found as stipulated.

During the years in issue, petitioners Albert Gersten and his wife, Lucille Gersten,⁴ and Myron P. Beck and his wife, Ann H. Beck, were residents of Los Angeles, California. Petitioners Milton Gersten and his wife, Mary Gersten, were residents of

³ See footnote 2, *supra*.

⁴ Lucille Gersten secured an interlocutory decree of divorce in California from Albert Gersten on April 3, 1950. Albert Gersten secured a final decree of divorce from a Mexican court on November 2, 1950, and on that day, in Mexico, married Bernice Anne Gersten with whom he filed a joint return for 1950.

Whittier, California. All of the individual petitioners kept their books and reported their income on a cash basis. The corporate petitioners and another corporation, J. Richard Company, kept their books and filed their returns on an accrual basis. The returns of all petitioners and those of J. Richard Company were filed with the former collector of internal revenue for the sixth district of California.

From July 1947 until the end of 1950, petitioners Albert Gersten and Myron P. Beck were the controlling stockholders of four corporations which were engaged in the business of subdividing tracts of land, constructing houses thereon, and selling such houses. Petitioner Milton Gersten was a stockholder in two of such corporations.

The extension of pipelines for water service was essential to the subdivision of the tracts and the sale of the houses constructed thereon. In order to provide water facilities for the subdivisions, contracts were entered into with the San Gabriel Valley Water Company, hereinafter referred to as San Gabriel, which agreed to extend its waterlines into the subdivisions in question, conditioned, however, upon payment by the subdividing corporations of the cost of such extensions. San Gabriel was a California water utility corporation, subject to the jurisdiction of the Public Utilities Commission of the State of California. It held a franchise to operate in the area in which the tracts in question were located. The minimum rate for water which San Gabriel charged during 1948, 1949, and 1950 was \$1.25 per month.

Under the contracts, San Gabriel was to make payments to the subdividing corporations on the basis of its gross receipts from the sale of water to homes in the particular subdivision. The payments were to be made for a period of ten years from the date the lines were completed, unless the full amount should be paid prior to the end of such ten-year period, and a subdividing corporation might or might not receive repayment in full. The corporations did not hold title to the facilities.

The four corporations were all dissolved by December 31, 1950. Substantial amounts of their payments to San Gabriel remained unpaid at the time of their dissolution, and such contracts, which were fully transferable, were assigned to their stockholders. Similar contracts to those here in issue were bought and sold, and, under normal conditions, approximately 70 per cent of the original payment might be expected on such contracts. Some of the conditions which affected the amount which might be refunded were: (1) the time in which all houses within a subdivision were completed; (2) the time within which the houses, once completed, were sold and occupied; and (3) the amount of water the consumers used, which in turn was dependent on such factors as the number of water-consuming appliances owned by them, weather conditions during the year, and the amount of plantings and vegetation needing irrigation.

In computing its gain for income tax purposes, each of the four corporations included the payments made to San Gabriel in arriving at the cost

of the houses sold. The respondent determined that such payments should not have been so included.

Upon the dissolution of the corporations, Albert Gersten, Myron P. Beck, and Milton Gerston received all corporate assets, including the water contracts. They did not assign any value to their respective interests in such contracts, in arriving at the gain realized upon liquidation of the corporations. The respondent determined that each of the contracts did have a fair market value when they were received by the stockholders in liquidation, and on the basis thereof increased the amount of capital gain realized in his determination of deficiencies herein. Details of the contract which each corporation entered into with San Gabriel, and the manner in which such contracts were treated for tax purposes by both the corporations and the transferees of corporate assets, were as follows:

J. Richard Company. J. Richard Company, hereinafter referred to as Richard, was a California corporation, incorporated on July 10, 1947, and dissolved on or about June 22, 1950. Richard's stock was owned equally by Albert Gersten and Myron P. Beck. During the course of its existence, Richard acquired three tracts of land which it subdivided into lots on which it constructed and sold houses. On December 3, 1947, petitioner Albert Gersten, on behalf of Richard, entered into a contract with San Gabriel providing for the installation of waterlines to two of the three tracts. San Gabriel completed the installation of the waterlines on April 2, 1948. The contract provided for a payment to San Ga-

briel of \$23,764, which sum was paid to it by Richard on or about the date on which the contract was entered into. San Gabriel agreed to repay such payment "in the amount of $\frac{1}{3}$ of the gross revenues derived from sale of water to occupants of said subdivisions for a period not to exceed 10 years from date hereof."

On December 2, 1948, petitioner Albert Gersten, on behalf of Richard, entered into a similar contract with San Gabriel to provide water facilities for the third tract. The contract provided for the payment of \$15,258, which amount was paid to San Gabriel by Richard on or about December 2, 1948. San Gabriel agreed to repay such payment in the amount of one-third of the gross revenue derived from the sale of water for a period not exceeding ten years from the date of the contract.

At the time of Richard's dissolution, on June 22, 1950, San Gabriel had repaid \$2,325.37 on the contract covering the first two tracts, and \$1,277.69 on the contract covering the third tract. All of the houses constructed by Richard on the first two tracts had been sold by June 1, 1949, and all of the houses constructed by it on the third tract had been sold by February 3, 1950.

On its income tax return for the fiscal year ended June 30, 1949, Richard included \$24,735.99 of its payments to San Gabriel in computing the total cost of houses sold by it during such year. On its return for the fiscal year ended June 30, 1950, it included \$11,149.22 of the payments made to San Gabriel in computing the cost of houses sold by it

during that year. In determining deficiencies against Albert Gersten and Myron P. Beck, as transferees of Richard for such years, the respondent disallowed the inclusion by Richard of payments to San Gabriel for the installation of water facilities, as being a part of the cost of houses sold by it.

Upon the dissolution of Richard on June 22, 1950, petitioners Albert Gersten and Myron P. Beck were each paid cash in the amount of \$38,202.12, and received a 50 per cent interest in Richard's contracts with San Gabriel. They did not assign any value to the interest received in such contracts in computing the amount of capital gain realized on the dissolution of Richard. Respondent determined that such contracts had a fair market value of 50 per cent of the amount which remained unpaid on June 22, 1950, or \$17,709.48, and accordingly increased the amount of capital gain realized by Gersten and Beck on Richard's distribution of its assets to them.

The contracts had a fair market value at the time of Richard's dissolution, equal, at least, to the amount determined by the respondent.

Whittier Development Company. Whittier Development Company, hereinafter referred to as Whittier, was a California corporation, incorporated on August 20, 1948, and dissolved on or about December 28, 1950. From February 28, 1950 to December 28, 1950, its stock was owned as follows:

| | | |
|----------------|----|----------|
| Albert Gersten | 40 | Per cent |
| Myron P. Beck | 40 | " " |
| Milton Gersten | 20 | " " |

During the course of its existence, Whittier acquired two parcels of land which it subdivided into lots on which it constructed and sold houses. In order to provide water facilities for such tracts, it entered into two contracts with San Gabriel. The first was dated November 29, 1949. Whittier agreed to and did pay, on or about that date, the sum of \$23,841 to San Gabriel. San Gabriel agreed to repay such payment within ten years from the date of the contract by payment of 35 per cent of the annual gross revenues derived from the sale of water. On March 10, 1950, Whittier entered into a second contract with San Gabriel providing for the installation of water facilities to the other tract which it owned. It paid San Gabriel the sum of \$5,214. San Gabriel agreed to repay such sum within a ten-year period from completion of the installation of the facilities. Such repayment was to be made from 35 per cent of the gross revenues derived by it from the sale of water. Installation of the facilities was completed by April 14, 1950. By December 28, 1950, San Gabriel had repaid \$1,413.02 on the first contract and \$62.98 on the second. Whittier had sold all houses on the first tract by June 7, 1950, and on the second tract by December 15, 1950.

On the return which Whittier filed for the fiscal year ended February 28, 1950, it included \$14,253.67 of the amount paid to San Gabriel under the first contract as a part of the cost of houses sold during such taxable year. In determining the deficiencies herein, the respondent disallowed the in-

clusion of such sum as a part of the cost of houses sold by Whittier.⁵

Upon the dissolution of Whittier on December 28, 1950, petitioners Albert Gersten and Myron P. Beck each received the sum of \$77,160.26 and a 40 per cent interest in each of Whittier's contracts with San Gabriel. Petitioner Milton Gersten received the sum of \$38,580.13 and a 20 per cent interest in each of the contracts with San Gabriel. Albert Gersten, Beck, and Milton Gersten did not assign any value to the interest received in such contracts in computing the amount of capital gain realized on the dissolution of Whittier. Respondent determined that such contracts had a fair market value of 50 per cent of the amount which remained unpaid on December 28, 1950, or \$14,545.50, and accordingly increased the amount of capital gain realized by Albert Gersten, Beck, and Milton Gersten on Whittier's distribution of its assets to them. Such contracts had a fair market value at the time of Whittier's dissolution, equal, at least, to the amount determined by the respondent.

Rex Land Company. Rex Land Company, hereinafter referred to as Rex, was a California corporation, incorporated on February 4, 1949, and dissolved on or about October 25, 1950. Its stock was equally owned by petitioners Albert Gersten and

⁵ The amount of the payments to San Gabriel included by Whittier in computing the cost of houses sold during the fiscal period March 1, 1950 to December 28, 1950, is not in issue, since respondent determined an overpayment of tax for such period.

Myron P. Beck. Rex acquired a tract of land which it subdivided into lots on which it constructed and sold houses. On February 9, 1949, it entered into a contract with San Gabriel for the installation of waterlines to the tract. For the installation of such facilities, Rex agreed to and did pay to San Gabriel the sum of \$14,707.20. San Gabriel agreed to repay such payment within a ten-year period from the date on which installation of the facilities was completed, which was April 22, 1949. Such repayment was to be made from 35 per cent of the gross revenues derived by it from the sale of water. By October 25, 1950, San Gabriel had repaid \$949.02 of such sum. All of the houses constructed on the tract were sold by March 16, 1950.

On its income tax return for the period February 4, 1949 to January 31, 1950, Rex included \$12,658.61 of the amount paid to San Gabriel as a part of the cost of houses sold by it during such period. On its return for the fiscal period ended October 25, 1950, it included \$1,265.12 of such payment as a part of the cost of houses sold by it during such period. In determining the deficiencies herein, respondent disallowed the inclusion of such sums as a part of the cost of the houses sold.

Upon the dissolution of Rex on October 25, 1950, petitioners Albert Gersten and Myron P. Beck each received the sum of \$1,158.84 in cash, a 50 per cent interest in certain real property having a fair market value of \$215,350, and a 50 per cent interest in Rex's contract with San Gabriel. Gersten and Beck did not assign any value to the interest received in

such contract in computing the amount of capital gain realized on the dissolution of Rex. Respondent determined that the contract had a fair market value of 50 per cent of the amount which remained unpaid on October 25, 1950, or \$7,132.68, and accordingly increased the amount of capital gain realized by them on Rex's distribution of its assets to them. Such contract had a fair market value at the time of Rex's dissolution, equal, at least, to the amount determined by the respondent.

Lawrence Land Company. Lawrence Land Company, hereinafter referred to as Lawrence, was a California corporation, incorporated on March 25, 1949, and dissolved on or about December 31, 1950. The stock of the corporation was owned as follows:

| | | |
|----------------|----|----------|
| Albert Gersten | 40 | Per cent |
| Myron P. Beck | 50 | " " |
| Milton Gersten | 10 | " " |

Lawrence acquired a parcel of land which it subdivided into lots on which it constructed and sold houses. On January 26, 1950, it entered into a contract with San Gabriel for the installation of waterlines to the tract. Such contract was modified by a subsequent contract entered into on February 14, 1950. Under the contract, as modified, Lawrence agreed to and did pay to San Gabriel the sum of \$31,021. San Gabriel agreed to repay such sum within a ten-year period from the date on which installation of the facilities was completed, which was March 29, 1950. Such repayment was to be made from 35 per cent of the gross revenue received from the sale of water to consumers. All of

the houses which Lawrence constructed on the tract were completed and sold by December 11, 1950. On its return for the fiscal period March 1, 1950 to December 31, 1950, Lawrence included the sum of \$31,021 paid to San Gabriel as a part of the cost of the houses sold. In determining the deficiencies herein, respondent disallowed the inclusion of the payment to San Gabriel. No repayments were paid by San Gabriel to Lawrence prior to Lawrence's dissolution on December 31, 1950; but payments commenced to be made on March 1, 1951. On December 31, 1950, Lawrence distributed to petitioner Albert Gersten the sum of \$78,382.40, and an undivided 40 per cent interest in certain real property, which interest had a fair market value of \$29,840, and a 40 per cent interest in the contract, as modified, with San Gabriel. It distributed to petitioner Myron P. Beck cash in the amount of \$97,978, a 50 per cent interest in certain real property, which interest had a fair market value of \$37,300, and a 50 per cent interest in Lawrence's contract with San Gabriel. It distributed to petitioner Milton Gersten the sum of \$19,595.59, a 10 per cent interest in certain real property, which interest had a fair market value of \$7,460, and a 10 per cent interest in the contract with San Gabriel. Albert Gersten, Beck, and Milton Gersten did not assign any value to the interest received in such contract in computing the amount of capital gain realized on the dissolution of Lawrence. Respondent determined that the contract had a fair market value of \$15,301.96 on December 31, 1950, and accordingly

increased the amount of capital gain realized by them on Lawrence's distribution of its assets to them. Lawrence's contract with San Gabriel had a fair market value at the time of its dissolution, equal, at least, to the amount determined by the respondent.

The trade or business of Richard was substantially similar to the trade or business of Lawrence.

Petitioner Albert Gersten and one Theodore Robbins each owned 50 per cent of the outstanding capital stock of a corporation, Homes Beautiful, Inc. Upon the dissolution of such corporation, each stockholder received assets in an amount exceeding \$44,721.60. In a proceeding before this Court, Homes Beautiful, Inc., was adjudged liable for deficiencies in its income taxes. The amount of such deficiencies and interest thereon was \$44,721.60. Petitioner Albert Gersten paid \$40,000 of such sum in December 1947 as a transferee of the corporation's assets and the remaining \$4,721.60 on April 5, 1949. Of such payment in 1949, \$3,460.47 was applied by the collector to principal and \$1,261.13 to interest. Theodore Robbins was insolvent on April 5, 1949.

On the joint return which Albert and Lucille Gersten filed for 1949, they deducted in full the \$4,721.60 payment made in that year. The respondent determined that one-half of the total payment, in the amount of \$2,360.80, was a payment on behalf of Theodore Robbins and was deductible as a nonbusiness bad debt under the provisions of section 23 (k) (4) of the Code of 1939; that \$1,730.23

represented petitioner Albert Gersten's liability as a transferee of the assets of Homes Beautiful, Inc., and was deductible as a long-term capital loss; and that the remaining \$630.57 was deductible by him as interest under section 23 (b).

On April 3, 1950, petitioner Lucille Gersten obtained an interlocutory decree of divorce from petitioner Albert Gersten in an action filed in the Superior Court of the State of California in and for the County of Los Angeles. On November 2, 1950, petitioner Albert Gersten obtained a final decree of divorce from Lucille Gersten in the First Civil Court of the State of Chihuahua of the Republic of Mexico, sitting at Juarez. On the same date he married Bernice Anne Gersten in Juarez. The California interlocutory decree was not final on the date of the Mexican divorce and marriage. At all times during the year 1950, petitioner Albert Gersten and Bernice Anne Gersten were residents and domiciliaries of the State of California.

Opinion

Turner, Judge: The first issue raised in the proceedings is whether the payments which the four corporations, Richard, Whittier, Rex and Lawrence, made to San Gabriel were properly included by such corporations in computing the cost of the houses which they constructed and sold. The respondent determined that the amounts paid to San Gabriel were not properly includible by the corporations in computing their cost of goods sold because all such payments were repayable. Petition-

ers, on the other hand, argue that the liability of each of the corporations to pay for the installation of the water facilities was fixed and absolute; and that despite whatever possibility there was of a repayment of part or all of the amounts paid, the payments were none the less properly includible in computing the cost of the houses sold.

In *Colony, Inc.*, 26 T. C. 30, we had much the same question as here.⁶ There the corporate taxpayer, which was engaged in the business of subdividing tracts of land and selling lots, made payments to utility companies for the installation of gas and electric service under contracts which called for the repayment of the amounts paid, such repayments to be made by payment of a specified amount for each new customer who purchased service from the gas company's mains or connected to the electric company's lines. The repayments were to be made only for a period of either five or ten years from the date of the contract. The Commissioner took the position that the taxpayer was not entitled to include any part of the payments so made to the utility companies as a part of the cost of the lots which it sold during the taxable years, because of the possibility that all or a part of such payments might be repaid. We concluded that the determining factor was that the taxpayer had made unconditional payments to the utility companies in order to obtain service from them for the purchasers of its

⁶ *Colony, Inc.*, was affirmed ... F. 2d ... (April 22, 1957), but there was no appeal on the comparable question herein.

lots. We held that the payments were thus closely related to the sale of the lots and that the taxpayer's income from such sales would be more clearly reflected if a pro rata portion of the payments which it made to the utility companies was included in its basis for determining the gain or loss on each lot sold.

We see no distinguishing difference in that case and the one before us here. It is true that there the repayments were measured by a fixed sum to be paid for each new customer who purchased service from the utility companies, while here the payments depended upon the amount of water sold by San Gabriel in the various subdivisions. But in both cases the controlling facts were that the corporations made unconditional payments to provide utility service for the subdivisions, and such payments were directly related to the property sold. We therefore conclude that the payments which the four corporations here made were a proper item to be included in computing the cost of the property which they sold.

The second issue is whether each of the water contracts which petitioners Albert Gersten, Milton Gersten and Myron P. Beck received from the corporations upon their dissolution had a fair market value at that time. The individual petitioners did not report any value for such contracts in computing the amount of gain realized by them upon the distribution of corporate assets. The respondent determined that each contract had a fair market value, and accordingly increased the amount of

gain reported by the individual petitioners from the distribution of such assets to them.

The petitioners contend that the contracts had no ascertainable fair market value at the time the corporations were dissolved, and citing *Burnet v. Logan*, 283 U. S. 404; *Westover v. Smith*, 173 F. 2d 90; and *Commissioner v. Carter*, 170 F. 2d 911, affirming 9 T. C. 364, argue that the distribution in liquidation did not as to those contracts result in closed transactions and, as a consequence, that no amounts were to be attributed to the contracts at the times of liquidation, but that the payments from San Gabriel subsequent to the dissolutions were to be reported as capital gains as received.

The evidence shows that each of the contracts did have a fair market value at the time the corporations were dissolved, and we have so found. None of the contracts were as much as three years old at the time of distribution, and the payments under them had commenced on all except the Lawrence contract. They began on that one shortly thereafter. All houses had been completed and sold by the time each corporation dissolved. Expert witnesses testified that contracts, similar to those here, were bought and sold, and that one might expect to receive as much as 70 per cent of the total original payment on such similar contracts. There was testimony to the effect that a proposed freeway would cross the subdivision developed by Lawrence. No showing, however, was made that the plans for the freeway route were final, or, if adopted, the extent to which the occupancy of the

houses within the area would be affected during the repayment period. Neither was there any showing that petitioners would or would not have a claim for compensation, if and when their rights to repayment might be destroyed as a result of the building of the freeway.

The record, in our opinion, amply sustains the respondent in his determination of fair market value, and we have so found in our findings of fact.

In *Westover v. Smith*, *supra*, and *Commissioner v. Carter*, *supra*, the facts were that contractual rights received upon the dissolution of the corporation had no ascertainable fair market value. Here the facts are otherwise. See *Pat O'Brien*, 25 T. C. 376.

The third issue is as to the deductibility of \$4,721.60 paid by Albert Gersten in 1949, in satisfaction of Federal tax liabilities of Homes Beautiful, Inc., a dissolved corporation, of which he had owned 50 per cent of the capital stock and had received 50 per cent of the assets in liquidation. The remainder of the stock had been owned by Theodore Robbins, who likewise had received 50 per cent of the assets of the corporation upon liquidation. The payment of \$4,721.60 represented a final payment by Gersten, as transferee, of tax and interest owing by Homes Beautiful, Inc. He had previously paid \$40,000 in 1947, and presumably had not been reimbursed by Robbins for any part thereof. It is stipulated that Robbins was insolvent at the time of the final payment in 1949.

On the joint return filed by Albert and Lucille

Gersten for 1949, they deducted the above, \$4,721.60 in full. The respondent in his determination treated the payment as having been made by Gersten one-half for his own account and the remainder for the account of Robbins. He further determined that the \$2,360.80 treated as having been paid on behalf of Robbins was a nonbusiness bad debt, deductible as a short-term capital loss under section 23 (k) (4) of the Internal Revenue Code of 1939. Of the \$2,360.80 treated as having been paid by Gersten on his own behalf, he allowed in full the deduction of \$630.57, as representing one-half of the amount which was interest. The remaining \$1,730.23 was determined to have been a long-term capital loss under the provisions of section 171 and subject, for deduction purposes, to the limitations of that section.

Taking the position that Robbins had contributed no amount to the tax payments made as transferee of Homes Beautiful, Inc., and relying on *Fox v. Commissioner*, 190 F. 2d 101, reversing 14 T. C. 1160, and *Pollak v. Commissioner*, 209 F. 2d 57, reversing 20 T. C. 376, it is the petitioner's contention that as a guarantor he had been called upon to pay the principal obligation of an insolvent debtor, and that the resulting loss, under the cases cited, was a loss incurred in a transaction entered into for profit, within the meaning of section 23 (c) (2), and as such, was deductible in full. On brief, the respondent now takes the position that the entire \$4,721.60 is to be regarded as having been paid by Gersten for his own account, that \$1,261.13 of

the amount paid was interest, deductible by Gersten in full, and under *Arrowsmith v. Commissioner*, 344 U. S. 47, the remaining \$3,460.47 was a long-term capital loss, which, for purposes of deduction, is subject to the limitations thereon.

That the Fox and Pollak cases do not represent sound law has recently been settled by the Supreme Court in *Putman v. Commissioner*, 352 U. S. 82, and it follows that petitioner's claim that the loss sustained upon the payment in 1949 was a loss incurred in a transaction entered into for profit under section 23 (e) (2) is not well taken. It also follows, from the pronouncements of the Supreme Court in the Putnam case, that such portion of the payment as was made by Gersten on behalf of Robbins, and for which he had a claim against Robbins, was a nonbusiness bad debt, deductible as a short-term loss under section 23 (k) (4).

As to that portion of the payment which represented a satisfaction of Gersten's own liability as transferee of *Homes Beautiful, Inc.*, *Arrowsmith v. Commissioner*, *supra*, is controlling, and the loss sustained was a long-term capital loss.

Whether or not the 1949 payment was in total amount a payment on Robbins' behalf, as petitioner contended in seeking application of section 23 (e) (2), or represented payments on behalf of both Gersten and Robbins in equal amounts, as the respondent determined, presents a question more difficult of solution. We are not advised as to the circumstances relating to the payment of the \$40,000 in 1947. The record does not show whether it was

made by Gersten with or without some understanding between him and Robbins. We are only advised that he paid the full \$40,000 in 1947, and that at the time of making the final payment in 1949, Robbins was insolvent. The record being as it is, we have found no sound basis for disturbing the respondent's determination herein, under which he treated one-half of the \$4,721.60 as having been paid by Gersten for his own account and the other half on account of Robbins. The respondent's determination is accordingly sustained.

The fourth issue is whether petitioner Albert Gersten, and Bernice Anne Gersten, whom he married at Juarez, Mexico, in 1950, were entitled to file a joint income tax return for such year. The respondent has determined that Albert Gersten was not legally married to Bernice Anne Gersten during 1950 and that they therefore were not entitled to file a joint return as husband and wife, as permitted by section 51 (b) of the 1939 Code.⁷

Albert Gersten contends, first of all, that the respondent has neither the function nor the right to challenge the validity of the marriage relationship. We think that argument without merit. Section

⁷ Sec. 51. Individual Returns.

* * * * *

(b) Husband and Wife.—

(1) In General.—A husband and wife may make a single return jointly. Such a return may be made even though one of the spouses has neither gross income nor deductions. If a joint return is made the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.

51 (b) provides that a husband and wife may make a single return jointly. Obviously, the respondent has not only the right but the duty of determining whether a man and woman who file a joint return are, in fact, legally married and entitled to file such a return under the provisions of the statute. This was made clear in *Marriner S. Eccles*, 19 T. C. 1049, *affd.* 208 F. 2d 796; and *Commissioner v. Ostler*, 237 F. 2d 501, affirming a Memorandum Opinion of this Court filed July 25, 1955.

We said, in *Marriner S. Eccles*, *supra*, that marriage, its existence and dissolution, is particularly within the province of the states. Hence, we look to the law of the State of California, the residence and domicile of both Albert Gersten and of Bernice Anne Gersten, to determine if a valid marriage existed between them on December 31, 1950.

Albert Gersten has shown that his second marriage in Mexico was formally solemnized. Under California law, upon such a showing, a second marriage is presumed legal and the former marriage is presumed dissolved. Such presumption, however, is overcome by evidence showing that the former spouse was living and that neither a divorce nor an annulment was ever procured. *Goff v. Goff*, 52 Cal. App. 2d 23, 125 Pac. 2d 848; *Clendenning v. Parker*, 69 Cal. App. 685, 231 Pac. 765. No suggestion was made here that Lucille Gersten was not living on the date of Albert's marriage to Bernice, and we know that the California interlocutory decree which she obtained had not become final on that date.

Section 150.1 of the Civil Code of California provides:

§ 150.1 Foreign divorce of parties domiciled in state; effect

A divorce obtained in another jurisdiction shall be of no force or effect in this State, if both parties to the marriages were domiciled in this State at the time the proceeding for the divorce was commenced.

Under California law, actual domicile is necessary to give a court jurisdiction for divorce proceedings, and where there is no domicile there can be no valid divorce. In *re McNutt's Estate*, 36 Cal. App. 2d 542, 98 Pac. 2d 253. The State of California was a legitimate party involved in any divorce proceedings between Albert and Lucille Gersten, and its courts have sole and exclusive jurisdiction over the marriage status of those domiciled within its boundaries, as all three parties here concerned were. Foreign divorce decrees obtained on assumed residence are not in good faith and are open to attack in the state of true matrimonial domicile. *Kegley v. Kegley*, 16 Cal. App. 2d 216, 60 Pac. 2d 482; *Roberts v. Roberts*, 81 Cal. App. 2d 871, 185 Pac. 2d 381. The divorce which Albert obtained in Mexico therefore was of no force and effect in California, since it was obtained through assumed residence. In *re Davis' Estate*, 38 Cal. App. 2d 579, 101 Pac. 2d 761.

The Civil Code of California, Section 61, provides:

§ 61. Bigamous and polygamous marriages; exceptions, absentees

A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless:

1. The former marriage has been annulled or dissolved. In no case can a marriage of either of the parties during the life of the other, be valid in this state, if contracted within one year after the entry of an interlocutory decree in a proceeding for divorce. [Emphasis added.]

We think it clear, under the express provisions of the California Code, that Albert and Bernice, who were both residents of the State throughout 1950, were in no position to marry until such time as Albert became finally divorced from his wife, Lucille. The marriage between Albert and Bernice was specifically prohibited by section 61, and void from the beginning. In *re Elliott's Estate*, 165 Cal. 339, 132 Pac. 439; In *re Gregorson's Estate*, 160 Cal. 21, 116 Pac. 60; *Parmann v. Parmann*, 56 Cal. App. 2d 67, 132 Pac. 2d 851; *People v. Little*, 41 Cal. App. 2d 797, 107 Pac. 2d 634; *Vickers v. State Bar of California*, 32 Cal. App. 2d 247, 196 Pac. 2d 10.

We therefore conclude that the respondent correctly determined that petitioner Albert Gersten and Bernice Anne Gersten were not legally married on December 31, 1950 and were not entitled

to file a joint Federal income tax return for such year.

The fifth and final issue raised herein is whether the business of J. Richard Company was substantially similar to the trade or business of Lawrence Land Company, within the meaning of section 430 (e) (2) (B) (ii) of the 1939 Code,⁸ for purposes of computing its excess profits tax liability for its fiscal period March 1, 1950 to December 31, 1950.

⁸ Section 430. Imposition of Tax.

* * * * *

(e) New Corporations.—

* * * * *

(2) First five taxable years.—For the purpose of this subsection—

* * * * *

(B) The taxpayer shall be considered to have been in existence and to have had taxable years for any period during which it or any corporation described in any clause of this subparagraph was in existence, and the taxpayer shall be considered to have commenced business on the earliest date on which it or any such corporation commenced business:

* * * * *

(ii) Any corporation if a group of not more than four persons who control the taxpayer at any time during the taxable year also controlled such corporation at any time during the period beginning twelve months preceding their acquisition of control of the taxpayer and ending with the close of the taxable year; but only if at any time during such period (and while such persons controlled such corporation) such corporation was engaged in a trade or business substantially similar to the trade or business of the taxpayer during the taxable year. For the purpose of this clause, the term "control" means the ownership of more than 50 per centum of the total combined voting power of all classes

Section 430 imposed an excess profits tax on the income of corporations for each taxable year ending after June 30, 1950, and beginning before January 1, 1954. Subsection (e) of such section imposed a lesser rate of tax in the case of corporations which commenced business after July 1, 1945, and whose fifth taxable year ended after June 30, 1950. The rates of tax so provided were as follows: First and second year, 5 per cent; third year, 8 per cent; fourth year, 11 per cent; fifth year, 14 per cent. For purposes of determining a corporation's years of existence, the subsection provided that, to the actual number of years which a new corporation had been in existence, there was to be added the years prior to its incorporation in which any other corporation had been in existence, if such old corporation was engaged in a trade or business substantially similar to the trade or business of the new corporation, and if such old corporation was controlled by not more than four persons who also

of stock entitled to vote, or more than 50 per centum of the total value of shares of all classes of stock. A person shall not be considered a member of the group referred to in this clause unless during the period referred to in this clause he owns stock in such corporation at a time when the members of the group control such corporation and he owns stock in the taxpayer at a time when the members of the group control the taxpayer. For the purpose of this clause, the ownership of stock shall be determined in accordance with the provisions of section 503, except that constructive ownership under section 503 (2) (2) shall be determined only with respect to the individual's spouse and minor children.

controlled the new corporation. Lawrence Land Company was incorporated on March 25, 1949, and dissolved on December 31, 1950. In computing its excess profits tax liability under section 430, it claimed that it was a second year corporation within the meaning of the statute. J. Richard Company was incorporated on July 10, 1947, and dissolved on June 22, 1950. Respondent determined that since Albert Gersten and Myron P. Beck owned all of its stock, and since they and Milton Gersten owned all of Lawrence's stock, and since J. Richard Company's business was substantially similar to that of Lawrence, that the years of J. Richard Company's existence prior to the incorporation of Lawrence must be added to those of Lawrence for the purposes of section 430 (e) (2) (B) (ii), and that Lawrence was therefore in its fourth taxable year rather than its second.

We think the respondent's determination was correct. Obviously, both corporations were engaged in the subdividing of tracts of land and in the construction and sale of houses, which we are satisfied was substantially the same "trade or business" within the meaning of the statute. The petitioner attempts to find support for a contrary conclusion in the language of the report of the Senate Committee on Finance, S. Rept. No. 781, 82d Cong., 1st Sess. (1951), p. 73. The report states:

These special ceiling rates available to new corporations in their period of development are not to be available to new corporations created as the result of either a tax-free reorganization

or a taxable transaction of the type where, under your committee's action, the purchasing corporation would be entitled to base its income credit on the earnings experience of the predecessor. Your committee believes that such corporations do not truly represent 'new business.' * * *

It further states, however, "They [special ceiling rates] are also denied new corporations which are controlled by persons owning an old corporation engaged in the same business through old corporations." We think the language of the statute itself so clear that no resort need be had to its history in interpreting what it means. But certainly the committee report above referred to does not support a result contrary to the one which we reach here. The businesses of the two corporations were not only similar, but, to our way of thinking, identical. We conclude that the respondent correctly determined that Lawrence Land Company was in its fourth taxable year within the meaning of the statute.

Decisions will be entered under Rule 50.

Served and Entered June 28, 1957.

Tax Court of the United States
Washington

Docket No. 51226

ALBERT GERSTEN, Petitioner,

V.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion of the Court filed June 28, 1957, the parties on October 25, 1957, having filed an agreed computation of the tax involved, it is

Ordered and Decided: That there is a deficiency in income tax for the taxable year 1950 in the amount of \$7,847.90.

Entered: Oct. 30, 1957.

[Seal] /s/ BOLON B. TURNER,
 Judge.

Served and Entered Oct. 31, 1957.

Tax Court of the United States
Washington

Docket No. 51228

MYRON P. BECK and ANN H. BECK,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion of the Court filed June 28, 1957, the parties on October 25, 1957, having filed an agreed computation of the tax involved, it is

Ordered and Decided: That there are deficiencies in income tax for the taxable years 1949 and 1950 in the respective amounts of \$1,340 and \$5,254.68.

Entered: Oct. 30, 1957.

[Seal] /s/ BOLON B. TURNER,
Judge.

Served and Entered Oct. 31, 1957.

Tax Court of the United States
Washington

Docket No. 51229

MILTON GERSTEN and MARY GERSTEN,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion of the Court filed June 28, 1957, the parties on October 25, 1957, having filed an agreed computation of the tax involved, it is

Ordered and Decided: That there is a deficiency in income tax for the taxable year 1950 in the amount of \$1,984.73.

Entered: Oct. 30, 1957.

[Seal] /s/ BOLON B. TURNER,
Judge.

Served and Entered Oct. 31, 1957.

[Title of Tax Court and Docket No. 51226.]

PETITION FOR REVIEW OF DECISION OF TAX COURT

Comes Now petitioner Albert Gersten and petitions for a review of the decision of the Tax Court rendered in the above entitled matter, and alleges as follows:

I.

The above entitled proceeding involves the petitioner's income taxes for the year 1950.

The questions presented are as follows:

(a) Whether certain contracts, assigned and distributed to petitioner upon the dissolution of certain corporations of which he was a stockholder, respectively had or had not ascertainable fair market values on the date of such distribution, for the purpose of determining petitioner's capital gain on the dates of the final liquidations, respectively, of said corporations.

It was the decision of the Tax Court that on the respective dates of said distributions, such contracts did have respective ascertainable fair market values to the extent determined by respondent, and to that extent were required to be included in the computation of petitioner's gain; and

(b) Whether, during the year 1950, petitioner was or was not, under California law, married to Bernice Ann Gersten and accordingly, whether or not petitioner and Bernice Ann Gersten were en-

titled to file a joint return as husband and wife, as permitted by Section 51 (b) of the Internal Revenue Code of 1939.

It was the decision of the Tax Court that in 1950, petitioner and Bernice Ann Gersten were not legally married under California law and therefore were not entitled to file a joint Federal income tax return for such year.

II.

The review is sought before the United States Court of Appeals for the Ninth Circuit.

III.

At all times herein mentioned, petitioner has resided and now resides in the County of Los Angeles, State of California, and filed his income tax return for the year involved with the Collector of Internal Revenue at Los Angeles, California.

The place where the office of said Collector (now Director) of Internal Revenue at Los Angeles is located is within the Circuit of the United States Court of Appeals for the Ninth Circuit, and said Court is the court having jurisdiction of a review of the decision of the Tax Court herein under the provisions of Sec. 7482 (a) of the Internal Revenue Code of 1954, and venue under Sec. 7482 (b) of said Internal Revenue Code.

The decision of the Tax Court was entered October 30, 1957. The time for filing a Petition for Review will therefore expire January 28, 1958, under Sec. 7483 of the Internal Revenue Code of 1954.

Wherefore, your petitioner prays that a review be had of the decision of the Tax Court rendered in the above entitled matter, and that upon such review said decision be reversed.

Respectfully submitted,

/s/ JACOB SHEARER.

Of Counsel:

TANNENBAUM, STEINBERG &
SHEARER.

Affidavit of Mailing Attached.

[Endorsed]: T.C.U.S. Filed Jan. 24, 1958.

[Title of Tax Court and Docket No. 51228.]

PETITION FOR REVIEW OF DECISION
OF TAX COURT

Come Now petitioners Myron P. Beck and Ann H. Beck, and petition for a review of the decision of the Tax Court rendered in the above entitled matter, and allege as follows:

I.

The above entitled proceeding involves the petitioners' income taxes for the year 1950.

The question presented is whether certain contracts, assigned and distributed to petitioner Myron P. Beck upon the dissolution of certain corporations of which petitioner was a stockholder, respectively had or had not ascertainable fair market values on the date of such distribution, for the

purpose of determining petitioner's capital gain on the dates of the final liquidations, respectively, of said corporations.

It was the decision of the Tax Court that on the respective dates of said distributions, such contracts did have respective ascertainable fair market values to the extent determined by respondent, and to that extent were required to be included in the computation of petitioner's gain.

II.

The review is sought before the United States Court of Appeals for the Ninth Circuit.

III.

At all times herein mentioned, petitioners have resided and now reside in the County of Los Angeles, State of California, and filed their income tax return for the year involved with the Collector of Internal Revenue at Los Angeles, California.

The place where the office of said Collector (now Director) of Internal Revenue at Los Angeles is located is within the Circuit of the United States Court of Appeals for the Ninth Circuit, and said Court is the court having jurisdiction of a review of the decision of the Tax Court herein under the provisions of Sec. 7482 (a) of the Internal Revenue Code of 1954, and venue under Sec. 7482 (b) of said Internal Revenue Code.

The decision of the Tax Court was entered October 30, 1957. The time for filing a Petition for Review will therefore expire January 28, 1958,

under Sec. 7483 of the Internal Revenue Code of 1954.

Wherefore, your petitioners pray that a review be had of the decision of the Tax Court rendered in the above entitled matter, and that upon such review said decision be reversed.

Respectfully submitted,

/s/ JACOB SHEARER.

Of Counsel:

TANNENBAUM, STEINBERG &
SHEARER.

Affidavit of Service by Mail Attached.

[Endorsed]: T.C.U.S. Filed Jan. 24, 1958.

[Title of Tax Court and Docket No. 51229.]

PETITION FOR REVIEW OF DECISION OF TAX COURT

Come Now petitioners Milton Gersten and Mary Gersten, and petition for a review of the decision of the Tax Court rendered in the above entitled matter, and allege as follows:

I.

The above entitled proceeding involves the petitioners' income taxes for the year 1950.

The question presented is whether certain contracts, assigned and distributed to petitioner Milton Gersten upon the dissolution of certain corporations of which petitioner was a stockholder, respec-

tively had or had not ascertainable fair market values on the date of such distribution, for the purpose of determining petitioner's capital gain on the dates of the final liquidations, respectively, of said corporations.

It was the decision of the Tax Court that on the respective dates of said distributions, such contracts did have respective ascertainable fair market values to the extent determined by respondent, and to that extent were required to be included in the computation of petitioner's gain.

II.

The review is sought before the United States Court of Appeals for the Ninth Circuit.

III.

At all times herein mentioned, petitioners have resided and now reside in the County of Los Angeles, State of California, and filed their income tax return for the year involved with the Collector of Internal Revenue at Los Angeles, California.

The place where the office of said Collector (now Director) of Internal Revenue at Los Angeles is located is within the Circuit of the United States Court of Appeals for the Ninth Circuit, and said Court is the court having jurisdiction of a review of the decision of the Tax Court herein under the provisions of Sec. 7482 (a) of the Internal Revenue Code of 1954, and venue under Sec. 7482 (b) of said Internal Revenue Code.

The decision of the Tax Court was entered October 30, 1957. The time for filing a Petition for Review will therefore expire January 28, 1958, under Sec. 7483 of the Internal Revenue Code of 1954.

Wherefore, your petitioners pray that a review be had of the decision of the Tax Court rendered in the above entitled matter, and that upon such review said decision be reversed.

Respectfully submitted,

/s/ JACOB SHEARER.

Of Counsel:

TANNENBAUM, STEINBERG &
SHEARER.

Affidavit of Service by Mail Attached.

[Endorsed]: T.C.U.S. Filed Jan. 24, 1958.

[Title of Tax Court and Docket Nos. 51226 to
51242, incl.]

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed, by and between the parties hereto, by their respective counsel, that the facts hereinafter stated shall be taken as true, provided, however, that upon the trial of this case either party hereto shall have the right to (a) introduce other and further evidence not inconsistent with the facts herein stipulated; and (b) object to the materiality of any fact herein stipulated.

J. Richard Co.

Docket—none

1. J. Richard Co. was incorporated July 10, 1947 and dissolved on or about June 22, 1950. The corporation's voting stock was owned during the entire period by Albert Gersten 50% and Myron Beck 50%. The corporation acquired three tracts of land, subdivided them, built homes thereon and then sold the homes.

2. J. Richard Co. contracted for the purchase of 30 acres of land on or about July 17, 1947 and for 10 acres of land on or about August 13, 1947. Eserows covering said parcels were closed and conveyances were made to J. Richard Co. on October 24, 1947 and September 29, 1947. This land became tracts No. 14954 and 15062 referred to in Ex. 1 and consisted of 196 lots upon which 191 homes were built.

3. The Map of Tract No. 14954 was recorded on February 18, 1948, and the first work of any kind performed upon said Tract, consisting of grading, was commenced on or about that date. The first occupancy by a purchaser of a home in said Tract was subsequent to December 15, 1948, and all the homes were sold by June 1, 1949.

4. The Map of Tract No. 15062 was recorded on March 17, 1948, and the first work of any kind performed on said Tract, consisting of grading, was commenced on or about that date. The first occupancy by a purchaser of a home in said Tract was

subsequent to December 15, 1948, and all of the homes were sold by June 1, 1949.

5. J. Richard Co. acquired 5 acres of land on or about February 2, 1948 and 28 acres of land on or about December 22, 1948. The total of 33 acres were contiguous and became the land included in Tract No. 11838 referred to in Ex. 2 and consisted of 163 lots upon which 163 homes were built. The Map of Tract 11838 was recorded on January 19, 1949, and the first work performed upon said Tract, consisting of grading, was commenced on or about that date. The first occupancy by a purchaser of a home in said Tract was subsequent to June 27, 1949 and all of the homes were sold by February 3, 1950.

6. On December 3, 1947 the contract marked Ex. 1 was entered into between Albert Gersten on behalf of J. Richard Co., and San Gabriel Valley Water Co. which concerned the installation of water pipe lines to Tracts No. 14954 and 15062. This contract is referred to on the books of the water company as Job No. 363 W.

6(a). On December 2, 1948 the contract marked Ex. 2 was entered into between Albert Gersten on behalf of J. Richard Co., and San Gabriel Valley Water Co. which concerned the installation of water pipe lines to Tract 11838. This contract is referred to on the books of the water company as Job No. 447 W.

7. A transcript of the 241 ledger of the San Gabriel Valley Water Company for Job No. 363 W is as follows:

Albert Gersten
6363 Wilshire Blvd.
Los Angeles 48, Calif.

Job No. 363 W—Tract No. 15062-14954—Cont. Date 11/21/47—
Comp. Date 4/2/48—Expir. Date 11/21/57—Rate: 1/3.

| Date | Charges | Credits | Balance |
|-----------|---------|-----------|-----------|
| | | 23,764.00 | 23,764.00 |
| 7-19-48 | 1.98 | | 23,762.02 |
| 10-28-48 | 55.71 | | 23,706.31 |
| 1-24-49 | 234.55 | | 23,471.76 |
| 5-19-49 | 231.72 | | 23,240.04 |
| 9-15-49 | 384.69 | | 22,855.35 |
| 11-16-49 | 615.04 | | 22,240.31 |
| 2-24-50 | 500.19 | | 21,740.12 |
| 6-14-50 | 301.49 | | 21,438.63 |
| 9-26-50 | 428.97 | | 21,009.66 |
| 12-12-50 | 641.32 | | 20,368.34 |
| 3- 1-51 | 416.37 | | 19,951.97 |
| 4-15-51 | 283.35 | | 19,668.62 |
| 8-17-51 | 453.40 | | 19,215.22 |
| 10-17 | 637.09 | | 18,578.13 |
| 1-15-52 | 433.78 | | 18,144.35 |
| 6-24 | 183.81 | | 17,960.54 |
| 9-17-52 | 493.56 | | 17,466.98 |
| 1-19-53 | 419.53 | | 17,047.45 |
| 4-10-53 | 608.28 | | 16,439.17 |
| 7-29-53 | 188.91 | | 16,250.26 |
| 12- 9-53 | 572.61 | | 15,677.65 |
| 12-29-53 | 502.15 | | 15,175.50 |
| 4-14-54 | 677.42 | | 14,498.08 |
| 6-16-54 | 238.54 | | 14,259.54 |
| July 1954 | 561.41 | | 13,698.13 |
| Oct. 1954 | 446.23 | | 13,251.90 |
| Dec. 1954 | 652.64 | | 12,599.26 |

8. A transcript of the 241 ledger of the San Gabriel Valley Water Company for Job No. 447 W is as follows:

Albert Gersten

6363 Wilshire Blvd.

Los Angeles 48, Calif.

Job No. 447 W—Tract No. 11838—Cont. Date 12/2/48—Comp.
 Date 2/28/49—Expir. Date 12/2/58—Rate: 1/3.

| Date | Charges | Credits | Balance |
|-----------|---------|-----------|-----------|
| | | 15,258.00 | 15,258.00 |
| 9-15-49 | 295.05 | | 14,962.95 |
| 11-15-49 | 284.69 | | 14,678.26 |
| 2-24-50 | 396.00 | | 14,282.20 |
| 6-13-50 | 301.89 | | 13,980.31 |
| 9-26-50 | 365.76 | | 13,614.55 |
| 12-12-50 | 375.32 | | 13,239.23 |
| 3- 1-51 | 349.99 | | 12,889.24 |
| 4-15-51 | 263.11 | | 12,626.13 |
| 8-17-51 | 407.27 | | 12,218.86 |
| 10-17 | 554.69 | | 11,664.17 |
| 1-15-52 | 398.98 | | 11,265.19 |
| 6-24 | 244.78 | | 11,020.41 |
| 9-17-52 | 203.18 | | 10,817.23 |
| 1-19-53 | 743.94 | | 10,073.29 |
| 4-10-53 | 302.14 | | 9,771.15 |
| 7-29-53 | 356.21 | | 9,414.94 |
| 12- 9-53 | 250.02 | | 9,164.92 |
| 12-29-53 | 809.80 | | 8,355.12 |
| 4-14-54 | 320.64 | | 8,034.48 |
| 6-16-54 | 427.03 | | 7,607.45 |
| July 1954 | 242.93 | | 7,364.52 |
| Oct. 1954 | 775.81 | | 6,588.71 |
| Dec. 1954 | 305.03 | | 6,283.68 |
| * * * * * | | | |

13. All 191 homes in Tracts No. 14954 and 15062, and 11 of 163 homes in Tract No. 11838 were sold by June 30, 1949. The remaining 152 homes in Tract No. 11838 were sold by June 30, 1950.

14. Exclusive of any amounts paid by J. Richard Co. to San Gabriel Valley Water Company during

its year ended June 30, 1948, J. Richard Co. sustained losses in said year of \$16,641.04.

15. Upon dissolution and liquidation, J. Richard Co. transferred its assets to its stockholders as follows:

(a) To petitioner Albert Gersten the sum of \$38,202.12 in cash, together with a 50% interest in each of the contracts marked Exs. 1 and 2.

(b) To petitioner Myron Beck the sum of \$38,202.12 in cash, together with a 50% interest in each of the contracts marked Exs. 1 and 2.

15(a). J. Richard Company is the same company referred to herein as J. Richard Co.

Whittier Development Co.
Docket 51239

16. Whittier Development Co. was incorporated August 20, 1948 and dissolved on or about December 28, 1950. The corporation was owned during the entire period February 28, 1950 to December 28, 1950, by Albert Gersten 40%, Myron P. Beck 40% and Milton Gersten 20%. The corporation acquired two tracts of land, subdivided them, built homes thereon and then sold the homes.

17. On or about March 25, 1949, Whittier Development Co. contracted for the acquisition for the parcel of land which it acquired on or about August 5, 1949. This land became tract No. 15741, referred to in Exhibit 3, and consisted of 241 lots upon which 238 homes were built. The map of tract 15741

was recorded on August 10, 1949, and the first work of any kind performed upon said tract, consisting of grading, was commenced in May, 1949. The first occupancy by purchaser of a home in said tract was subsequent to June 27, 1949, and all of the homes were sold by June 7, 1950.

18. On or about December 17, 1949, Whittier Development Co. acquired 10 acres of land which became tract No. 14001, referred to in Exhibit 4 and consisting of 53 lots upon which 50 homes were built. The map of tract 14001 was recorded on April 27, 1950, and the first work of any kind performed upon said tract, consisting of grading, was commenced on about that date. The first occupancy by purchaser of a home in said tract was subsequent to November 24, 1950, and all of the homes were sold by December 15, 1950.

19. On or about November 29, 1949, a contract marked Exhibit 3 was entered into between Whittier Development Co. and San Gabriel Valley Water Company which concerned the installation of water pipelines to tract No. 15741. This contract is referred to on the books of the Water Company as job No. 570 W.

20. A transcript of the 241 ledger of the San Gabriel Valley Water Company for job No. 570 W is as follows:

Whittier Development Company
6363 Wilshire Blvd.
Los Angeles 48, Calif.

Job No. 570 W—Tract No. 15741—Cont. Date 11/20/49—
Comp. Date — Expir. Date 4/29/59—Rate 35%.

| Date | Charges | Credits | Balance |
|-----------|---------|-----------|-----------|
| | | 23,841.00 | 23,841.00 |
| 2-23-50 | 29.78 | | 23,811.22 |
| 6-14-50 | 503.34 | | 23,307.88 |
| 9-26-50 | 396.22 | | 22,911.66 |
| 12-12-50 | 483.68 | | 22,427.98 |
| 3- 1-51 | 514.23 | | 21,913.75 |
| 4-15-51 | 383.62 | | 21,530.13 |
| 8-17-51 | 548.08 | | 20,982.05 |
| 10-17 | 783.46 | | 20,198.59 |
| 1-15-52 | 555.39 | | 19,643.20 |
| 6-24 | 286.27 | | 19,356.93 |
| 9-17-52 | 480.51 | | 18,876.42 |
| 1-19-53 | 769.34 | | 18,107.08 |
| 4-10-53 | 643.62 | | 17,463.46 |
| 7-29-53 | 376.73 | | 17,086.73 |
| 12- 9-53 | 603.82 | | 16,482.91 |
| 12-29-53 | 865.12 | | 15,617.79 |
| 4-14-54 | 692.92 | | 14,924.87 |
| 6-16-54 | 436.76 | | 14,488.11 |
| July 1954 | 571.74 | | 13,916.37 |
| Oct. 1954 | 822.43 | | 13,093.94 |
| Dec. 1954 | 660.83 | | 12,433.11 |
| * * * * * | | | |

25. Whittier Development Company is the same taxpayer referred to herein as Whittier Development Co.

26. Upon its dissolution and liquidation Whittier Development Co. transferred its assets to its stockholders as follows:

(a) To petitioner Albert Gersten the sum of \$77,160.26 in cash, together with a 40% interest in each of the contracts marked Exhibits 3 and 4.

(b) To petitioner Myron P. Beck \$77,160.27 in cash, together with a 40% interest in each of the contracts marked Exhibits 3 and 4.

(c) To petitioners Milton Gersten and Mary Ger-

sten the sum of \$38,580.13 in cash, together with a 20% interest in each of the contracts marked Exhibits 3 and 4.

(d) To petitioners referred to in (a), (b) and (c) a respective 40%, 40%, and 20% interest in a refundable deposit.

Rex Land Co.

Docket 51230

27. Rex Land Co. was incorporated February 4, 1949 and dissolved on or about October 25, 1950. The corporation was owned during the entire period by Albert Gersten 50% and Myron Beck 50%. The corporation acquired one tract of land, subdivided it, built homes thereon and then sold the homes. In addition, a second tract of land was purchased which was subdivided and then distributed to the stockholders upon dissolution.

28. Rex Land Co. acquired land on or about February 15, 1949 which became Tract No. 11960 referred to in Ex. 5 and consisted of 138 lots upon which 138 homes were built. The map of Tract No. 11960 was recorded on March 16, 1949, and the first work performed upon said Tract, consisting of grading, was commenced on or about that date. The first occupancy by a purchaser of a home in said Tract was subsequent to September 12, 1949 and all of the homes were sold by March 16, 1950.

29. On February 9, 1949 a contract, marked Exhibit 5, was entered into between Albert Gersten on behalf of Rex Land Co. and San Gabriel Valley Water Company which concerned the installation

of water pipelines to Tract No. 11960. This contract is referred to on the books of the Water Company as Job No. 429 W.

30. A transcript of the 241 Ledger of San Gabriel Valley Water Company for Job No. 429 W is as follows:

Albert Gersten
6363 Wilshire Boulevard
Los Angeles 48, California

Job No. 429 W—Tract No. 11960—Cont. Date 2/9/49—Comp.
Date 4/22/49—Expir. Date 4/22/49—Rate: 35%.

| Date | Charges | Credits | Balance |
|----------|----------|-------------|-------------|
| | | \$14,707.20 | \$14,707.20 |
| 9/16/49 | \$ 76.59 | | 14,630.61 |
| 12/ 6/49 | 160.24 | | 14,470.37 |
| 2/13/50 | 264.89 | | 14,205.48 |
| 6/13/50 | 281.75 | | 13,923.73 |
| 9/25/50 | 165.55 | | 13,758.18 |
| 12/12/50 | 435.03 | | 13,323.15 |
| 3/ 1/51 | 315.68 | | 13,007.47 |
| 4/15/51 | 213.07 | | 12,794.40 |
| 8/17/51 | 307.32 | | 12,487.08 |
| 10/17 | 442.20 | | 12,044.88 |
| 1/15/52 | 326.43 | | 11,718.45 |
| 6/24 | 207.77 | | 11,510.68 |
| 9/17/52 | 153.07 | | 11,357.61 |
| 1/19/53 | 592.01 | | 10,765.60 |
| 4/10/53 | 249.69 | | 10,515.91 |
| 7/29/53 | 309.49 | | 10,206.42 |
| 12/ 9/53 | 221.21 | | 9,985.21 |
| 12/29/53 | 546.17 | | 9,339.04 |
| 4/14/54 | 241.37 | | 9,097.67 |
| 6/16/54 | 349.43 | | 8,748.24 |
| July '54 | 195.94 | | 8,552.30 |
| Oct. '54 | 623.87 | | 7,928.43 |
| Dec. '54 | 228.42 | | 7,700.01 |

* * * * *

36. On or about June 22, 1950 Rex Land Co. acquired a parcel of land consisting of approximately 12 acres. This real property became Tract No. 16553 and was recorded on October 3, 1950. Rex Land Co. subdivided this land into 59 lots and installed streets, lights, water and gas. In connection with the final liquidation of Rex Land Co., Tract No. 16553 was distributed equally to Albert Gersten and Myron P. Beck prior to October 25, 1950. Upon final liquidation, this land had a fair market value of \$215,350.00.

37. Upon dissolution and liquidation, Rex Land Co. transferred its assets to the stockholders as follows:

(a) To petitioner Albert Gersten \$1,158.84 in cash, together with an undivided 50% interest in certain real property having a fair market value of \$107,675.00 and a 50% interest in the contract of February 9, 1949, marked Exhibit 5.

(b) To petitioner Myron P. Beck the sum of \$1,158.84 in cash, together with an undivided 50% interest in certain real property having a fair market value of \$107,675.00 and a 50% interest in the contract marked Exhibit 5.

(c) To each of the petitioners referred to in (a) and (b), a 50% interest in a State tax claim.

37a. Rex Land Company is the same taxpayer referred to herein as Rex Land Co.

Lawrence Land Co.

Docket 51233

38. Lawrence Land Co. was incorporated March 25, 1949 and dissolved on or about December 31, 1950. The corporation was owned during the entire period by Albert Gersten 40%, Myron Beck 50%, and Milton Gersten 10%. The corporation acquired a tract of land, subdivided it, built homes thereon and then sold the homes.

39. Lawrence Land Co. contracted for the purchase of 58.86 acres of land on or about May 18, 1949. This land became tract No. 15650 referred to in Exhibits 6 and 7, which consisted of 287 lots upon which 285 homes were built. The map of tract 15650 was recorded on February 15, 1950 and the first work of any kind performed upon the tract, consisting of grading, was commenced on or about that date. The first occupancy by a purchaser of a home in said tract was subsequent to August 11, 1950 and all of the homes were sold by December 11, 1950.

40. On January 26, 1950 a contract marked Exhibit 6 was entered into between Lawrence Land Co. and San Gabriel Valley Water Company which concerned the installation of water pipelines to tract 15650. This contract was modified by a contract dated February 14, 1950, marked Exhibit 7. These contracts are referred to on the books of the Water Company as job No. 585 W.

41. A transcript of the 241 ledger of the San

Gabriel Valley Water Company for job No. 585 W is as follows:

Lawrence Land Co.
6363 Wilshire Blvd.
Los Angeles 48, Calif.

Job No. 585 W—Tract No. 15650—Cont. Date 2-14-50—Comp.
Date 3-29-50—Expir. Date 3-29-60—Rate: 35%.

| Date | Charges | Credits | Balance |
|-----------|----------|-----------|-----------|
| | | 31,021.00 | 31,021.00 |
| 3- 1-51 | 957.08 | | 30,063.92 |
| 1-15-52 | 2,912.56 | | 27,151.36 |
| 4-10-53 | 2,692.46 | | 24,458.90 |
| 4-12-54 | 3,312.43 | | 21,146.47 |
| Dec. 1954 | 3,274.50 | | 17,871.97 |

* * * * *

46. Lawrence Land Company is the same taxpayer referred to herein as Lawrence Land Co.

47. Upon its dissolution and liquidation, Lawrence Land Co. transferred its assets to its stockholders as follows:

(a) To petitioner Albert Gersten the sum of \$78,-382.40 in cash, together with an undivided 40% interest in certain real property having a fair market value of \$29,840.00 and a 40% interest in the contracts marked Exhibits 6 and 7.

(b) To petitioner Myron P. Beck the sum of \$97,978.00 in cash, together with an undivided 50% interest in certain real property having a fair market value of \$37,300.00 and a 50% interest in the contracts marked Exhibits 6 and 7.

(c) To petitioners Milton and Mary Gersten the sum of \$19,595.59 in cash, together with an undivided 10% interest in certain real property having

a fair market value of \$7,460.00 and a 10% interest in the contracts marked Exhibits 6 and 7.

* * * * *

Albert Gersten—1950

Docket 51226

53. On April 3, 1950, Petitioner Lucille Gersten obtained an interlocutory decree of divorce from Petitioner Albert Gersten in an action filed in the Superior Court of the State of California in and for the County of Los Angeles, entitled Lucille Gersten vs. Albert Gersten, Case No. D-382,738.

54. On November 2, 1950, Petitioner Albert Gersten appeared before the judge of the First Civil Court of the State of Chihuahua of the Republic of Mexico at Juarez, and obtained a final decree of divorce from said Lucille Gersten. Subsequent thereto, but on the same day in Juarez, Petitioner Albert Gersten married Bernice Anne Gersten.

55. The California interlocutory decree, Case No. D-382,738, was not final at the time of the Mexican divorce and marriage on November 2, 1950.

56. At all times during the year 1950, Petitioner Albert Gersten and Bernice Anne Gersten were residents of the State of California.

57. Petitioner reported his one-half interest in land received by him from the liquidation of Rex Land Co. (referred to herein at Paras. 36 and 37) at a fair market value of \$118,000.00. The notice of deficiency and petition do not disturb this valuation. However, the valuation is hereby raised as an issue in this proceeding and the fair market value is agreed to be \$107,675.00.

58. In Docket 51226 petitioner concedes all issues in the notice of deficiency except as follows:

(a) Respondent's determination that Albert Gersten is not entitled to file a joint return with Bernice Anne Gersten for 1950;

(b) An adjustment of \$11,104.87 referred to as Item (a) Long-term capital gain on page 2 of the notice of deficiency attached to the petition; and

(c) The valuation of certain land referred to in Para. 57 hereof.

Myron P. Beck and Ann H. Beck—1949-1950
Docket 51228

59. Petitioners reported their one-half interest in land received by them from the liquidation of Rex Land Co. (referred to herein at Para. 36 and 37) at a fair market value of \$118,000.00. The notice of deficiency and petition do not disturb this valuation. However, the valuation is hereby raised as an issue in this proceeding and the fair market value is agreed to be \$107,675.00.

60. In Docket 51228 the petitioners concede all issues except as follows:

(a) The adjustment of \$12,982.93 referred to as Item (a) long-term capital gain on page 3 of the deficiency notice attached to the petition.

(b) The valuation of certain land referred to in Para. 59 hereof.

Milton Gersten and Mary Gersten—1950
Docket 51229

61. In Docket 51229 petitioners concede all issues except an adjustment of \$2,238.55 referred to as Item (a) long-term capital gain on page 1 of the notice of deficiency attached to the petition.

Transferees

62. The following parties are liable as transferees of the assets of the following corporations in the amount of the corporate deficiencies determined in this proceeding:

| Transferor | | Transferee | |
|--------------------------|------------|----------------|------------|
| Name | Docket No. | Name | Docket No. |
| J. Richard Co. | None | Albert Gersten | 51237 |
| | | Myron P. Beck | 51238 |
| Whittier Development Co. | 51239 | Albert Gersten | 51240 |
| | | Myron P. Beck | 51241 |
| | | Milton Gersten | 51242 |
| | | Mary Gersten | 51242 |
| Rex Land Co. | 51230 | Albert Gersten | 51231 |
| | | Myron P. Beck | 51232 |
| Lawrence Land Co. | 51233 | Albert Gersten | 51234 |
| | | Myron P. Beck | 51235 |
| | | Milton Gersten | 51236 |
| | | Mary Gersten | 51236 |

In Dockets 51232, 51235, 51238 and 51241. Ann H. Beck is not the transferee of any of the corporations referred to in those dockets.

General

63. At all times material hereto, San Gabriel Valley Water Company (hereinafter sometimes referred to as "San Gabriel") was a California water utility corporation subject to the regulatory juris-

diction of the Public Utilities Commission of the State of California.

64. None of the purchasers of any of the residences included in any of the tracts above mentioned were required, by or in connection with the contract of purchase of the residence, to use or purchase water from San Gabriel, in any amount, or for any period, or at all.

65. San Gabriel Valley Water Company holds a franchise for the area in which Tracts 14954, 15062, 11838, 15741, 14001, 11960 and 15650 are located.

66. Tracts 14954, 15062, 11838, 15741, 14001, 11960, 15650 are located in the same neighboring area.

67. There were substantially no vacant houses in the neighboring area referred to in Para. 66 hereof during 1948, 1949 and 1950.

68. The respective tracts subdivided and developed by each of J. Richard Co., Whittier, Lawrence and Rex were not contiguous to the tracts of any of the other of said corporations.

69. The water contracts marked Exs. 1, 2, 3, 4, 5, 6 and 7 were transferable at the request of the party who owned the contracts with San Gabriel Valley Water Company.

70. Exs. 1 through 7 and A through O are attached to this stipulation and made a part hereof.

71. All refunds made under the contracts shown on Exs. 1, 2, 3, 4, 5, 6 and 7 received before disso-

lution of the corporations were credited and offset against the cost of houses sold on the corporate books except \$235.55 and \$231.72 received on January 24, 1949 and May 19, 1949, respectively, by J. Richard Co.

72. The extension of the pipe lines for the service of water provided for in Exs. 1, 2, 3, 4, 5, 6 and 7 was essential to the subdivision and sale of the subdivision tracts herein involved and in the absence of the refund provisions of said Exs. 1, 2, 3, 4, 5, 6 and 7 would have been properly added to the cost of the houses sold with respect to each of the subdivision tracts.

73. Each of petitioners, Albert Gersten, Lucille Gersten, Myron P. Beck, Milton Gersten and Mary Gersten, kept books and reported their income upon a cash basis of receipts and disbursements.

* * * * *

75. The minimum rate per month for water consumers which was charged by San Gabriel Valley Water Company during the periods 1948, 1949 and 1950 was \$1.25.

76. None of the petitioners herein held title to the water pipe line installations which are referred to in Exs. 1, 2, 3, 4, 5, 6 and 7.

77. The payments to San Gabriel Valley Water Company referred to in Exs. 1, 2, 3, 4, 5, 6 and 7 were paid on or about the date of the contracts.

78. The words "cont." and "comp." used in the 241 ledger of San Gabriel Valley Water Company mean contract and completion respectively.

79. None of the refunds from the contracts marked Exs. 1, 2, 3, 4, 5, 6 and 7 were reported by the former stockholders after the corporations were dissolved until some time in either December, 1952, or January, 1953, at which time amended returns for the year 1951 were filed in which all refunds to December 31, 1951 were reported.

/s/ JACOB SHEARER,
Counsel for Petitioners.

/s/ R. P. HERTZOG,
Acting Chief Counsel, Internal Revenue Service,
Counsel for Respondent.

[Endorsed]: T.C.U.S. Filed April 29, 1955.

[Title of Tax Court and Docket Nos. 51226 to
51242, incl.]

SUPPLEMENTAL STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed, by and between the parties hereto, by their respective counsel, that on July 1, 1950 the San Gabriel Valley Water Company had outstanding 277 water facilities contracts.

/s/ JACOB SHEARER,
Counsel for Petitioners.

/s/ JOHN POTTS BARNES,
Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

[Endorsed]: T.C.U.S. Filed Aug. 24, 1955.

In the Tax Court of the United States

Docket Nos. 51226 to 51242, incl.

ALBERT GERSTEN, et al., Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

U. S. Post Office, Courtroom No. 9, Los Angeles,
California, Friday, April 29, 1955.

The above-entitled matter came on for hearing,
pursuant to notice to the parties, at 10:15
o'clock a.m.

Before: Honorable Bolon B. Turner, J., Pre-
siding.

Appearances: Jacob Shearer, Esq., 6535 Wilshire
Boulevard, Los Angeles, California for the peti-
tioners. George E. Constable, Esq., (Hon. Daniel
A. Taylor, Chief Counsel, Internal Revenue Serv-
ice) for the respondent. [1]*

Proceedings

The Clerk: Docket 51226, et cetera, Albert Ger-
sten and associated cases.

Will you state your appearances, gentlemen?

Mr. Shearer: Jacob Shearer for all petitioners.

Mr. Constable: George E. Constable for re-
spondent.

* Page numbers appearing at top of page of Reporter's Tran-
script of Record.

The Court: All right, Mr. Shearer, you may state the case.

Mr. Shearer: There are several issues in this case, your Honor, to dispose of; some minor ones I will dispose of, one relating solely to the petitioner Albert Gersten. That issue is the right to deduct a portion of the transferee liability in another case for which he was liable to the Government, which was paid by him by reason of the insolvency of his equal co-stockholder, both at the time of the determination of that deficiency and the time of payment of it.

The issue also involves his right to deduct all of the interest in connection with that payment, rather than one-half.

The Court: What do you mean "rather than one-half"?

Mr. Shearer: Respondent has disallowed one-half the interest on the theory that the payment was made apparently on behalf of the insolvent other stockholder and treats it along with half of the principal paid as a non-business bad debt. [3]

Our position is that as to the entire principal, the payment was made in the nature of a guarantor, and that petitioner is entitled to deduct it as a loss incurred, and that in any event, as to the interest, that he is liable for the entire amount and is entitled to deduct.

The Court: Why do you say that?

Mr. Shearer: Why do I say he is entitled——

The Court: To deduct it all?

Mr. Shearer: Because the stipulation will show

that he was fully liable to the Government for all of the interest. He paid the interest which he was obligated to pay.

The Court: He has a right of collection against any other party that is liable, doesn't he?

Mr. Shearer: Yes, your Honor, he has such a right of collection, providing he can collect it. But the interest which he pays is——

The Court: It wasn't his interest, was it?

Mr. Shearer: The Government didn't think so when they demanded it.

The Court: All right. Go ahead.

Mr. Shearer: The second issue relates again solely to the petitioner Albert Gersten, and it relates to the validity of a Mexican divorce and subsequent remarriage in relation to petitioner's right to file a joint return with his wife, that is, the lady whom he married after the Mexican divorce. [4]

The Court: I didn't get that exactly.

Mr. Shearer: The petitioner Albert Gersten obtained a Mexican divorce. Subsequent to that divorce, in the year 1950 he married, and the issue here presented is whether he may file a joint return for the year 1950 with the lady whom he married subsequent to the Mexican divorce. Both the divorce and the marriage took place in Mexico.

In that connection petitioner's former wife had obtained an interlocutory decree in 1950 in California. That decree was not final at the time of the Mexican decree. Respondent contests the validity of the Mexican divorce and, as a result, contests peti-

tioner's right to file the joint return with the second wife.

It is our position, first, that the Mexican decree was valid for this purpose and, second——

The Court: Why do you say, "for this purpose"? If it is valid, it is valid, isn't it?

Mr. Shearer: I don't think that is necessarily the law, your Honor. I think that there are void and voidable marriages, void and voidable divorces. A marriage, even though voidable, may be voidable only at the petition or instance of specific persons. We insist that even if this marriage is or was voidable, we don't concede that—the Commissioner of Internal Revenue is not one of those persons who may assert its invalidity. [5]

The Court: I would be interested in your brief on that.

Mr. Shearer: Yes, your Honor. There are, we think, both cases and rulings of the respondent itself in connection with that matter, which we will submit on brief.

The issue common to all of the corporate cases stems from separate transactions which each of these corporations entered into with the San Gabriel Valley Water Company. Each of the corporate taxpayers was engaged in the business of subdividing raw land, building homes thereon, and selling those homes. In order to comply with the requirements of California law relating to subdivisions, and in order to make water available to the homes, each of the corporations entered into separate contracts with San Gabriel, which was a privately

owned water company but subject to regulatory jurisdiction of the Public Utilities Commission of the State of California.

Each contract called for a given payment by the subdivider to San Gabriel, and that payment was determined by the cost of the water pipe installation which San Gabriel was to make and did make. The payment was in consideration of San Gabriel's agreement to extend its pipe lines and to make these installations for the service of water to the tract covered by the contract.

The pipe lines were laid in publicly dedicated streets and were not owned by the corporate taxpayers. Each of [6] the contracts also provided—and this provision was a requirement under the rules of the California Public Utilities Commission—that refunds or repayments were to be made by San Gabriel to the subdivider in question upon a contingent basis, that contingency being to the extent of a given percentage of revenues derived by San Gabriel from the sale of water to occupants of the particular subdivision and derived within the limited period of time, that is to say, ten years.

This ten-year period commenced in some of these cases when the contract was made, before any work in the way of water installations had commenced; and in other of the cases when the water pipe lines work had been completed, not the subdivision work, but the water pipe line installation had been completed.

The Court: When you say "revenues" you mean water sales?

Mr. Shearer: Sales, made by San Gabriel to occupants of the proposed homes. It is important in this connection to bear in mind that either the contract date, the contract with San Gabriel or the completion date—San Gabriel's completion date—were in all cases dates which considerably preceded the completion of any of the homes in the given subdivision and considerably preceded the sales and occupancies of those homes. The time lag, however, varied in several cases.

The Court: If they sold that much water, it wouldn't [7] make that much difference, would it?

Mr. Shearer: They sold how much water?

The Court: After the homes were completed, if the water company sold enough water to take care of the amount, it wouldn't make any difference whether the homes were completed or whether they weren't at the time of the period, would it?

Mr. Shearer: No water sales were made until after the occupants' homes were completed.

The Court: Well, that would be a rather obvious fact, I would assume, unless there was some temporary pipe in there for the use of water in construction.

Mr. Shearer: There were some, but those were completely trivial.

The Court: My query wasn't directed to that at all.

Mr. Shearer: I don't follow your Honor's query.

The Court: You say there was a ten-year period, but none of the homes were completed at the time

the ten-year period started to run, as I understand you.

Mr. Shearer: That is right.

The Court: All right. Suppose six years has elapsed before any home was completed and before any water was delivered by San Gabriel to occupants of homes, but in the remaining four years they used enough water to—the required amount of water. It wouldn't make any difference, would it, whether it was done in four— [8]

Mr. Shearer: What we are concerned with is what do we do with the payment made by San Gabriel in the year involved.

The Court: In what way does it make a difference?

Mr. Shearer: It makes this difference—

The Court: If they pay out and get the refund?

Mr. Shearer: It makes a difference. And it wasn't a matter of six years. At that stage of the game, the subdivider doesn't know whether he is going to get his refund or not, or how much, or what rate.

The Court: I am assuming a situation where he does.

Mr. Shearer: Then you have a problem of whether they can sell enough water in four years to make these refunds.

The Court: My proposition was that they did sell enough water. I wasn't assuming a case where they didn't or there wasn't enough sold.

Mr. Shearer: My contention is that that is hind-

sight, with which we are not concerned for this purpose.

The Court: All right. Why?

Mr. Shearer: It is taxpayer's position that these payments constituted a portion of the cost of the property sold by it, that is, that the payments——

The Court: I understand that.

Mr. Shearer: In order to properly reflect its [9] income, it was entitled to, and we think under the law required to, add in the year in which the payment was made or accrued those payments to the cost of the property which it sold, notwithstanding the possibility of recoupment; failure to recognize this result might involve the taxation of return of capital rather than of income, and the language I have just used—and our position—is substantially the position and language of the *Security Flower Mills* case and the *Freehauser Baking Company* case.

It is our position basically that the contingency that may arise later with respect to recoupment is not a contingency to be considered in determining the net income of taxpayer in the year of payment.

The Court: Well, I doubt that you will find the same situation here as was present in the *Security Flower Mills*.

Mr. Shearer: I used the word "language", your Honor, the language of the *Security Flower Mill*. I do think we have the identical situation with the *Freehauser* case.

The Court: You have to read language along

with the facts with respect to which the language is used.

Mr. Shearer: I understand that, your Honor. The concept there involved was adopted in substantially similar circumstances in the Freehauser case.

The language to which I referred was quoted with approval, and I think we have there the cases substantially on [10] all 4's with our case in principle, and very close to it, in fact, except that in one case you are dealing with bread and flower and the other with land and water.

I am stating our position, your Honor.

The Court: I understand you were stating your position, but I was trying to get an understanding of your position by proposing a set of facts, but you apparently don't want to discuss them, so go ahead and possibly we will get at it on brief.

Mr. Shearer: I think this may come in when I follow on with respondent's position in this matter, because respondent has determined that these payments to San Gabriel by the subdividers are capital expenditures. But they are not, he says, capital expenditures for the water pipe lines, which the subdividers don't own, but capital expenditures for the right to receive back, perhaps, the capital expenditures. In other words, it is respondent's position that the payments made are for a contract to receive under limited conditions, in the light of certain contingencies, to receive back the very payments made; for that reason it is an acquisition of property rather than a part of the costs of goods sold in connection with the subdivided land.

Our position is that such a determination is completely unrealistic in this sense, that if there is one thing sure in connection with this, the subdivider can never receive [11] more than that which he pays, and to treat this as an investment or purchase transaction by the subdivider is entirely unreal and escapes the real meaning of the transaction.

The Court: Do you take the position that the corporations gave up all right and interest in this money so paid in, is that right?

Mr. Shearer: Yes, without a question they did.

The Court: All right.

Mr. Shearer: I think that is stipulated to.

The Court: Go ahead.

Mr. Shearer: I don't mean to infer——

The Court: I am not talking about earmarked dollars, mind you.

Mr. Shearer: Yes, I understand. What I am saying is that the payment was absolute and without right to repayment excepting as certain contingencies might occur. When I speak of stipulation, I am referring to that limited phase of it. I don't mean that respondent has stipulated that there were no rights of refund.

Your Honor mentioned the six-year period, and actually the period here involved, the lag period, will not reach anything like six years.

The Court: Apparently you weren't paying attention to what I was saying. I was supposing a case where it did. I wasn't saying that these did. I rather imagined they didn't. [12]

Mr. Shearer: Yes, I understand. However, I

took it that your Honor's example was to pose an extreme example.

The Court: I was giving you an exaggerated case to try to get you to give me some light on that situation, and maybe I could better understand your contention. But we will pass that now. Let's go ahead.

Mr. Shearer: Now, the common issue in the individual cases relates to the treatment, for the purpose of determining capital gain on the dissolution of these corporations, the treatment of the rights to receive refunds under these same contracts. We take the position that although, by the time of dissolution——

The Court: What individuals are you talking about and how did they obtain any right?

Mr. Shearer: All of the individual petitioners here, with the exception of Lucille, who was not concerned with this, were stockholders of various corporations in varying amounts.

The Court: These were the corporations that were building the houses?

Mr. Shearer: That is right.

The Court: And having the water lines run?

Mr. Shearer: These were the corporate petitioners here involved.

The Court: I bring that out, because now, mind you, [13] while we did go into this a bit at the call of the calendar, I am trying to get a clear statement of the issues here for the opening of this trial so we will have it in this transcript. So don't assume, be-

cause we covered something in the discussion here at the call of the calendar, that it will appear here in this transcript.

Mr. Shearer: Yes, your Honor.

The common issue with respect to the individual petitioners is their position as stockholders who received these rights under the water contracts to which we are now referring, upon the dissolution of the corporations. I won't here try to segregate which individuals received from which corporation.

The Court: About how long after the deposits or the paying of this money for the running of the water mains did the dissolutions occur?

Mr. Shearer: The time varied between approximately one to two years. But in each case, by that time, all of the homes had been built and all of the homes had been sold and substantially all of them, if not all of them, were by that time occupied.

Now, we take the position that in spite of the fact that some of the contingencies with which the subdivider was faced at the time he made the payments no longer existed at the time of the dissolution, contingencies such as delays in [14] completion for various reasons—and at the time of dissolution, substantially complete occupancy had been established—nevertheless, even at that time there remained sufficient other contingent factors with respect to the rights to receive these payments from San Gabriel which were beyond the control of both the taxpayers and, for that matter, of San Gabriel, which precludes the ascertainment of a fair market value at the time of dissolution of these rights

under the doctrine of *Burnett versus Logan* and *Westover versus Smith*.

The Court: Were these subdivisions located in the same general area?

Mr. Shearer: In the same general area.

The Court: Where?

Mr. Shearer: In Los Angeles County near the city of Whittier.

The Court: All right.

Mr. Shearer: That is not to say that the subdivisions all represented the same quality of property, a fact that comes into another issue. What I am trying to say is that there are better and worse locations in and around the city of Whittier, so that property is more or less valuable by reason of that.

The Court: That is usually the case around most cities, I have noticed.

Mr. Shearer: Yes, your Honor, and this area is no [15] exception. That is my point. I didn't wish the phrase, "the same general area," to blanket in that exception.

Now, respondent contends that the rights under the water contracts had, at the time of dissolution, a fair market value of 50 percent of the then unpaid balance thereof, there having been some payments made prior to the dissolution. On this issue we are relying solely on the *Burnett versus Logan* doctrine.

The Court: Wherein is that comparable?

Mr. Shearer: In the *Burnett-Logan* the sale was made——

The Court: Sale of what?

Mr. Shearer: Sale of a contract—the sale of stock was made with a sales price—purchase price was measured there by the amount of coal ore which was mined——

The Court: What sort of ore?

Mr. Shearer: Coal.

The Court: Coal?

Mr. Shearer: Coal.

The Court: Are you sure?

Mr. Shearer: Yes, your Honor. The contract stipulated that for each ton of coal mined by the corporation, whose stock was sold, the seller of that stock was to receive a given amount.

The Court: From whom were they to receive it?

Mr. Shearer: They were to receive it from the purchaser of the stock, not by the corporation whose stock was sold. The court made clear there that there was no obligation on the part of the operating company to mine one or more tons of ore during the life of this contract, although the opinion also makes it clear that at the very time of the sale coal was in fact being mined and that the contract unquestionably had a substantial value, the case going off on the proposition of not an ascertainable value, and the lack of need in the circumstances for income tax purposes to make that determination. That is our position here, except that here we have dissolution instead of the sale. At the moment of dissolution the purchasers, as it were, that is, the distributing stockholders, are entitled to receive payments dependent upon the use by third persons of the water. At that time there was no obligation

on the part of the purchasers of the water users to use that water although, just as in *Burnett versus Logan*—and for that matter in *Westover versus Smith*—under similar circumstances——

The Court: What are the circumstances in *Westover versus Smith*?

Mr. Shearer: That was a dissolution case. The corporation had sold patents; part of the sales price involved was the right to receive specific amounts measured by the patent products manufactured by the purchaser. There was no [17] requirement by the purchaser to manufacture any given amount at any given time.

The Court: When was that decided, in what court?

Mr. Shearer: That was decided in 1949 and was decided in the 9th Circuit. In that case the Court expressly stated, as a matter of fact, that the contract without question had a very substantial value, and the facts so indicated, because in fact the purchaser of the patent was producing the patented product and at the very time of dissolution was busy paying to—had paid to the corporation prior to the time of dissolution and continued to pay and was in the business of producing and continued to pay. The question there was how you measure this, just as we submit here; the question is not that people won't use water, but how do you measure what the stockholders are going to receive, because there is no reasonable way of measuring it.

Our position is that the tax collector waits and collects as the stockholders receive these refunds.

That was the position of the Supreme Court in *Burnett versus Logan*. It was the position of the 9th Circuit in *Westover versus Smith*, and it is our position here.

Now, in the case of the petitioner *Lawrence Land Company*, we have an issue as to excess profits taxes, whether the excess profits taxes should under Section 430 (E)(1) be computed at the rate for second-year corporations or fourth-year [18] corporations. Your Honor may recall that the second taxable year is smaller than the fourth taxable year rate, and of course petitioner is contending for the second and respondent for the fourth. This issue will turn upon the meaning intended by Congress to be given to the phrase "engaged in a trade or business substantially similar to the trade or business of the taxpayer," and relating to a prior corporation. This is an attribution section.

The Court: I don't follow you on your situation that you are talking about.

Mr. Shearer: I am about to come to it. This is a section which accepts the right of new corporations in given cases to use what is in fact their second year if stockholders of that corporation have owned or acquired within the period specified by the statute, stock of another corporation which was engaged in a similar trade or business to the trade or business of the taxpayer and which had an earlier taxable year.

The Court: Apply it to this case.

Mr. Shearer: I was about to. In this case there is no quarrel here at all about the facts in the sense

that the control in this case—the stockholders of Lawrence Land Company did, in fact, acquire within the prescribed period of time, stock and had the control of the stock of J. Richard Company, an earlier corporation.

Respondent's position is that the rate for Lawrence [19] must be computed for the fourth year because had J. Richard continued it would have been in the fourth year, in its fourth year of business. We concede that if Congress intended that the word "similar" related to industry similarity, our position is that what Congress, having in mind the purpose of the legislation which was to avoid splitting of corporations and having the new corporations pick up at a lower excess profits tax rate than those already in existence, what Congress was intending to do there was to limit its special rate for new corporations to corporations which truly started a new business. For that reason, even though concededly J. Richard and Lawrence, the two corporations here involved, were both in the business of subdividing land, there was the industry similarity, we will argue that the meaning of this particular phrase was related to a different kind of similarity, a similarity as to specific businesses. There will be little fact produced at the trial in connection with this beyond the stipulated facts, since most of the underlying facts are stipulated.

The Court: Well, I think I will have to read your brief to understand what you are talking about exactly there.

Mr. Shearer: I think, your Honor, this is the kind of issue which is better left to the brief, and I don't think further clarification will aid in the trial because, as I say, there will be very little in the way of evidence relating to this issue that isn't already in the stipulation. [20]

That about states it. There are transferee cases, but those issues have been stipulated. I do want to address myself to the stipulation when that is offered, but I will wait until then.

The Court: All right.

Mr. Constable: Your Honor, I have several points I would like to clear up before I offer any discussion on the perhaps main points involved.

We have entered into a very lengthy stipulation of facts, and it was only just last night that we completed it, so I would like at this time to clean up some tag ends on it if we may.

The Court: I would rather that you go ahead and state your issues before you start into matters pertaining to the stipulation of facts. I would like to have you state the points of difference on the statement of petitioners' counsel and any points of agreement; and on the points of difference, what the basis for them is.

Mr. Constable: In the first instance, referring to all the transferee dockets, in paragraph 62 of the stipulation petitioner has agreed that the petitioners in the transferee cases are transferees if there is a deficiency determined to the corporations, with the exception of one petitioner, they have so agreed,

and respondent has agreed that that particular petitioner is not a transferee. [21]

Now, referring to the corporation cases, there are four corporations. We call them Rex, Richard, Whittier, and Lawrence. Richard is not a docketed case but it is involved because of the valuation problems, valuation of its assets as transferred to the stockholders, so that Richard is in issue here through the stockholders' case. In all of the corporate cases, the water contract, as petitioner claims deductibility of the deposits made, is in issue. I think petitioner contends that these deposits are either costs of goods sold or in the alternative they are an expense.

The Court: How is that?

Mr. Constable: I think that petitioner, if I am correct, alternatively claims that the deductions in the case of water contracts to the corporations are, in the first instance, deductions in cost of goods sold.

The Court: That is my understanding.

Mr. Constable: Yes.

The Court: That is part of the cost of these houses that they sold.

Mr. Constable: That is correct. And respondent feels that the issue is more properly framed within that scope, but as I understand it now, petitioner feels that as an alternative these matters are deductible as expense.

The Court: I hadn't so understood.

Mr. Shearer: No. To explain that, we had so

[22] pleaded originally, assigned error to that, but our position is, cost of goods sold.

Mr. Constable: In Whittier Development Company, 51239, there are two years involved, but the latter year involves an overassessment and so is not in issue.

The Court: The petitioners' point is that this is part of the cost basis, these payments to the water company. What is the respondent's position?

Mr. Constable: I am coming to the meat of the deductibility of the water deposits now.

The Court: All right.

Mr. Constable: I think petitioner relies improperly on Burnett versus Logan. For one thing, in that case I believe it is iron and not coal, if I am not mistaken.

The Court: I think that is right.

Mr. Constable: In that case.

The Court: My memory I don't think would play me false on it, although that case was decided many, many years ago and I haven't looked at it in years, but I rather think it is iron ore.

Mr. Constable: Involved the Mahoney Mine, I think.

The Court: At least that is my recollection; I could be wrong.

Mr. Shearer: I will stipulate it was either coal or iron. [23]

The Court: It doesn't make any difference, I don't think. It might.

Mr. Constable: No, I don't think so.

The Court: It might. There might be some dif-

ference between mining coal and mining iron ore, I don't know. But go ahead.

Mr. Constable: In *Burnett versus Logan* we of course had the question from the other standpoint. We had a question of whether or not certain payments to be received in the future were income or not, and the case is perhaps distinguishable on that point.

The Court: What is that?

Mr. Constable: The case is perhaps distinguishable in that in the *Burnett versus Logan* case we had the question of whether or not certain payments to be made in the future, which were not ascertainable, whether or not the market value of those payments at a given date was to be taken into income. I believe that is the issue in *Burnett versus Logan*.

In our case we have the reverse situation. We have the question of whether or not an expenditure made for which recoupment is probably coming, whether that expenditure is an allowable deduction.

The Court: Or part of the cost basis?

Mr. Constable: That is correct, your Honor.

The Court: And the petitioner says they are [24] relying on the cost basis proposition, not a deduction.

Mr. Constable: All right.

The Court: Just what is the Government's view of it?

Mr. Constable: Well, your Honor, in *Burnett versus Logan*, I think the Government also relies on that case as standing for one of the basic concepts

of realization. In that case the Court looked, I believe, to the matter of probabilities and simply said, "We can wait and see in the case of this taxpayer just exactly what is realized from this transaction," and that is essentially the Government's case here, that the expenditure is made by the builder, and rather than allow him a deduction as his cost in the year that it is made, relying on the Logan case, we feel that we can wait until the ten-year period is expired and at that time determine with absolute accuracy the realization of the loss or the realization of what is a deduction at that time.

The Court: Well, whatever the Supreme Court had in mind in *Burnett versus Logan*, the effect was to put it on a cash receipts basis, those sellers of stock.

Mr. Constable: That is correct, your Honor.

The Court: All right.

Mr. Constable: In *Burnett versus Logan* the Court is, I think, establishing the concept of realization, gains and losses, and felt that to invoke principles of guesswork as to what iron would come out of this mine in the future was [25] something that, rather than to guess, we can just wait and see.

The Court: The so-called valuation experts would resent that statement of yours that that is guesswork.

Mr. Constable: Now, interestingly enough, there is a case—what is a very popular case—the *Cohan* case which, in addition to its popular point, has in it a problem very similar to our situation here. *Cohan* and *Harris* were co-owners of a lease on the

Chicago Opera House in Chicago, and they put their own plays on in this opera house under the lease that they jointly held, each having a 50 per cent interest. Time went on; differences arose, and it seemed that each wanted priority on his particular plays, so they made an agreement whereby Cohan would loan Harris \$150,000 and Harris would repay the \$150,000 to Cohan from his share of the receipts from the theater. Now, the reason this loan was made as part of their agreement. Harris would then give up all rights to having his plays shown in the theater. In other words, Cohan wanted the theater exclusively, so he loaned \$150,000 to Harris so that Harris could go out and finance his plays in other buildings.

Now, there was no personal obligation on the part of Harris to repay the \$150,000.

The Court: Except out of profits.

Mr. Constable: Except out of the profits of the theater. Now, without getting into the details of the specific issues involved in that case, I think it holds that the [26] \$150,000 was not deductible by Cohan in the year that it was made, and there we have a very similar situation. We have the repayment, dependent entirely upon the profits of the theater.

The Court: Where and when was that case decided?

Mr. Constable: That was the Second Circuit in 1930, your Honor, Learned Hand's opinion.

The Court: That is not The Cohan case?

Mr. Constable: That is The Cohan case.

The Court: That was one of the issues in it?

Mr. Constable: That is correct, your Honor.

The Court: Well, it has been completely lost by the use of the other one, I must say.

Mr. Constable: Now, another thing that I think is fundamentally wrong with petitioners' position with regard to the inclusion of these deposits into its cost of goods sold is that they are confusing what is a contingent liability with what is an absolute liability but payments to be ascertained. I don't want to say payments contingent, but perhaps that is it, that here we have an absolute—we have not a contingent liability. We have a fixed, determined liability, but the payments are uncertain.

The Court: What is the difference?

Mr. Constable: Well, I think this, your Honor. I don't want to rely on what our brother accounts to in connection with matters like this, but there they go to great [27] lengths in distinguishing between a situation where a man has an actual liability that exists as such but they don't know how much it is; in that case they don't call that a contingent liability. They call it an existing liability and set up a reservation of earnings or surplus of the corporation against that existing liability. They do not call it contingent. Rather, a contingent liability is the type where, oh, an action is instituted for certain damages. There, in that instance, the liability is not established. But in our case we have an existing, binding, contractual liability for repayment. The amount of payment, it is true, is uncertain, and I will certainly admit, from a sheer economic standpoint, there is a certain loss involved

because we have a non-interest bearing loan, so to speak, and economically if you loan \$100 to be repaid over ten years at ten dollars a year, you have certainly made a bad investment. But of course we are concerned with the legal aspects and not the economic aspects of the case.

The Court: As I followed petitioner, petitioner was applying *Burnett versus Logan* to the cases of the individual stockholders upon dissolution of the corporation, and wasn't referring to it with respect to the effect and nature of a payment in the first instance by the corporations to the water company. I don't know whether I follow you or not, because you haven't divided the two too definitely.

Mr. Constable: I have, your Honor, been directing [28] my attention until this point to the matter of inclusion of these costs in the cost of goods sold.

The Court: I see. All right. Now, what about the individual stockholders?

Mr. Constable: At that point I may say that the petitioner is correct, that the respondent's determination of the fair market value of the contracts to the individual stockholders is approximately 50 percent of what is the remaining face value of the contracts at the time of dissolution. In other words, the respondent has taken the initial deposit, deducted what has been refunded, which gives the remaining amount which can be recovered.

The Court: Some of the amounts paid already have been recovered at the time of dissolution?

Mr. Constable: That is correct.

The Court: I hadn't heard of that before. On what basis were they paid back?

Mr. Constable: Well, our stipulation of fact is very lengthy on that point. It goes into all of the refunds that were made and the dates that they were paid.

The Court: Just generally why were they paid back?

Mr. Constable: Well, your Honor, people moved into the homes and began using the water, and they paid their water bill, and the water company then refunded the deposit.

The Court: You mean some of them had used it?

Mr. Constable: That is correct. [29]

The Court: The anticipated amount or required amount of water within the two-year period, or was it just ratably refunded?

Mr. Constable: No, your Honor, the full amounts were not repaid.

The Court: I understand that, that is, the full amount that the corporation paid out. But was it a pro rata part or what, according to the use of water, or what?

Mr. Constable: Well, your Honor, the contracts provided that the water company will repay this deposit on the basis of one-third or in some contracts 35 per cent of the gross revenue that it receives from these particular water users.

The Court: And then have to wait until the end of the ten-year period?

Mr. Constable: No.

The Court: Or till enough water was used to cover the full amount?

Mr. Constable: That is correct.

The Court: I see.

Mr. Constable: It may be well at this point to give what I think is perhaps one of the critical clauses in these contracts. There are several, and I will select one that I think is typical.

For the sum of \$14,000, the deposit, the water company agrees to extend pipe lines for the service of water to the [30] petitioners' tracts, and going on, "* * * Refunds of the sum advanced will be made in the amount of 35 per cent of the gross revenue derived."

I might say, your Honor, this is a contract now between the water company and the builder.

The Court: Yes.

Mr. Constable: "Refunds of the sum advanced will be made in the amount of 35 per cent of the gross revenue derived from the sale of water to occupants of said subdivision for a period not to exceed ten years from the date of completion of the main extension. Refunds shall cease at the time the entire amount has been repaid should this occur prior to the expiration of the said ten-year period."

The Court: In other words, as water was used they immediately started getting part of the money back, is that correct?

Mr. Constable: That is correct, your Honor. Now, there is in each instance an understandable lag between the period that the deposit was made

and which refunds came in because the installation of the water mains is one of the first things done in a subdivision, and the deposit was made when the mains were installed, so there naturally was a lag during which time the homes were built, sold, and the people moved in and started using water.

The Court: How did the petitioner treat those [31] amounts that they get back?

Mr. Constable: Well——

The Court: In these years?

Mr. Constable: We have stipulated to that too. While the corporations were in existence, they picked up these refunds as a credit to their cost of houses sold.

The Court: They entered the amounts paid to the water company on their books as part of the cost of houses sold?

Mr. Shearer: That is correct.

The Court: And then credited this back as a recovery on that, is that correct?

Mr. Constable: That is correct. Now, after the corporations were dissolved and the contracts were in the hands of the stockholders, the stockholders—none of them—reported any of the refunds as income until in about December, 1952 or January, 1953 they filed amended returns for the year 1951 and picked up all the refunds that they had received to December 31, 1951.

The Court: What are our years?

Mr. Constable: Our year on the stockholders with regard to the valuation is 1950.

The Court: 1950?

Mr. Constable: Yes.

The Court: What are the years for the corporation?

Mr. Constable: There are varying dates, your [32] Honor, running from June 30, 1950—I am giving you now the last fiscal period—June 30, 1950 to December 31, 1950.

The Court: All right.

Mr. Constable: Within the last six months of 1950.

Now, I think at this time, your Honor, while I am on the matter of water contracts, our pleadings in many instances, many of the dockets refer to these refunds as contingent, and I have talked with Mr. Shearer and he has no objection, and informed me that it will not make a material difference in his case if I be permitted to amend certain sections of our answers by merely striking the word “contingent.” I can read those docket numbers and paragraph numbers into the record.

The Court: You better do it.

Mr. Shearer: Perhaps counsel’s statement to me, to which I answered “Yes”, was not audible. I said, “I have no objections.”

Mr. Constable: Then I will move to amend the respondent’s answer by striking the word “contingent” as it appears in the following paragraphs of the following docket numbers:

Docket 51231, paragraph 5 (e), 51232, 5 (e), 51234, 51235, 51236, 51237, 51238, paragraph 5 (f) for all those dockets. Docket 51239, docket 51240, 51241, 51242, paragraph 5 (e), for all those dockets.

51226, paragraphs 5 (j), 5 (v), 5 (x), 5 (hh), 5 (rr), 5 (tt), docket 51228, paragraphs 5 (k), 5 (w), 5 (y), 5 (ii), 5 (ss), 5 (uu); 51229, paragraph 5 (k), 5 (w), [33] 5 (y); docket 51230, paragraph 5 (e); 51233, paragraph 5 (f).

That is the end of my motion, your Honor.

The Court: The motion will be granted.

Mr. Constable: Now, your Honor, with the Court's permission I will leave the matter of includibility of these deposits into cost in the individual stockholders' cases with regard to the valuation problem of the water contracts; as was stated, respondent discounted the remaining face value at the date of dissolution to 50 per cent, approximately, and determined that that was the fair market value.

The Court: What effect did he give that in his determination of deficiency and inclusion of income?

Mr. Constable: Those items were then included as long-term capital gains.

The Court: As part of the property value received upon dissolution of the corporation in exchange for the stock?

Mr. Constable: That is correct, your Honor.

The Court: All right.

Mr. Constable: In the valuation case, again, your Honor, I feel that if the corporation cases fall with regard to the inclusion of the deposits in their cost, it probably will be that, that is, if those parts are includible in their costs, then I think we will still have the issue of valuing what

remains of the contracts to the stockholders. I think that is unquestioned. There is no doubt about that. [34]

That is all I intend to offer in my opening statement on the water contracts unless the Court wishes to hear more.

The Court: Well, I want to ask counsel for the petitioner: The respondent in his determination, as I understand it, has placed the amount in computing the receipts from liquidation of the corporation in respect to these water main matters at 50 per cent?

Mr. Shearer: Yes, your Honor.

The Court: Now, assuming that the Court concludes that the argument or contention relying on Logan versus Burnett, and Westover versus Smith, is not well taken, is the petitioner contesting the 50 per cent determination?

Mr. Shearer: We are not conceding it, your Honor, but we recognize we will not have met our burden in overcoming——

The Court: You what?

Mr. Shearer: We do not concede it, but we recognize that we will not have met our burden in connection with the presumption.

The Court: All right. In other words, you don't intend to put on any proof?

Mr. Shearer: Not valuation with respect to that point.

The Court: All right. You may go ahead. Mr. Constable. [35]

Mr. Constable: The stipulation of fact. I think,

trims the issues down very clearly. Giving the Court an example, we have taken each docket and specifically outlined what there remains for the Court to find in that particular docket.

That is all I have with respect to the corporation dockets.

I might touch on the excess profits problem. I think there the particular law involved is not so much a rate as it is a ceiling on a rate, and Congress intended to take new corporations and as they came into existence, fulfilling certain qualifications as a new corporation, then to give them a ceiling on their excess profits tax, and if they came into existence during the period between about '45 and '50, with certain other qualifications they then could become new corporations. And if they were one year old, the ceiling was 5 per cent. If they were two years old, it is still 5. If they are three years old, it goes up to 8, and if they are four years old the ceiling is 11, and at five years old it goes up to 14 per cent.

The issue involved was, was Lawrence Land Company a second-year corporation or a fourth-year; that is, was it two years old or four years old. Respondent is contending that it is four years old and hence entitled to only a higher ceiling.

The Court: It was actually organized——

Mr. Constable: It was actually incorporated in March of '49. [36]

The Court: And had been in existence in this taxable year; it was in its first year, is that the idea, as far as that corporation itself is concerned?

Mr. Constable: Your Honor, the period involved for Lawrence is March 1, 1950 to December 31, 1950.

The Court: I see.

Mr. Constable: The corporation was formed in March of '49.

The Court: I see.

Mr. Constable: Now, the law also provides that where we have common control of several corporations, it can be that, as for example here, Lawrence, if Whittier and Richard and Rex, the other corporations are similarly controlled by the same parties, then it may be that if these corporations are engaged in a trade or business substantially similar to the trade or business of the taxpayer corporation, then the formation date of the earliest of the corporations will be used in determining what ceiling on the excess profits tax is applied.

The Court: Yes.

Mr. Constable: And the facts, I don't think they are in dispute. On this issue I frankly am not too clear on what Mr. Shearer's position is. I think he is probably going to argue the matter of law.

The Court: He had some reference to Richard, but I was never able to understand what it was.

Mr. Constable: Well, your Honor, I believe the issue is in relation to Lawrence, Docket 51233.

The Court: That is right. But in connection with that he was referring to Richard. Now, just what the reference was, I don't know.

Mr. Constable: His reference there, I think the evidence will show, from the stipulation of facts,

that Richard was incorporated back in July, July 10, 1947 and commenced doing business on about that date. So that respondent has made the determination that, because Richard was—began in '47 and because Richard and the other companies were commonly owned and in a similar business, then Lawrence is a four-year-old corporation.

The Court: I see. That was respondent's determination?

Mr. Constable: That is correct, your Honor.

The Court: All right. And he was contending that Richard's period of existence has no applicability to Lawrence for the purpose of this provision of the statute?

Mr. Constable: Well, as I take it now——

The Court: We will ask him. Is that right?

Mr. Shearer: My position is that it depends on what Congress meant by the word "similar."

The Court: I am not asking you that. I understand that. But your position actually is that Richard doesn't control Lawrence? [38]

Mr. Shearer: No, no. I was narrowing the definition of the issues simply to the word "similar" because we have conceded that Richard was earlier incorporated and that the controlling factors existed, and their only escape is the similarity of business.

The Court: Well, I don't know why you resist the simple statement of matters, but if the statute and the interpretation of the statute and the word "similar" is as respondent contends, then do you concede——

Mr. Shearer: We concede, yes.

The Court: Concede?

Mr. Shearer: Yes.

The Court: But in the situation you contend that the statute is not read that way and thereby Richard has nothing to do with Lawrence?

Mr. Shearer: Yes, your Honor.

The Court: That is all I was asking.

Mr. Shearer: I'm sorry. I think the word "controlled"—

The Court: I wasn't asking anything about whether you were right or the respondent is wrong on the interpretation of the statute. I was just trying to get the point of dispute.

Mr. Shearer: The word "controls" happens to be used in that particular section, and I now see that your Honor was referring to control in a different sense when he directed his question. [39]

The Court: I wasn't referring to control at all. I was assuming a situation one way and then the other so I could understand what your differences were. All right, anything more on that point?

Mr. Constable: No, your Honor. That I think winds it up.

The Court: Now, unless there is something else relating to the corporation you better give me the respondent's position about the issue in the—what is it—the Gersten case, on the divorce and remarriage and joint return question.

Mr. Constable: Well, respondent's position on that one, your Honor, is very simple: I think we can show on brief—I have been unable to stipulate

with petitioner—that the divorce and marriage in Mexico were invalid in California. Respondent's position is that the petitioner was not married to this woman for purposes of filing his Federal income tax return at the end of 1950.

I think petitioner's statement that the Government should not intrude into the matrimonial questions is entirely incorrect because the statute places a tremendous burden on the respondent to determine just who are entitled to file under the joint return provisions.

The Court: That is based on whether they are married or not at the end of the year, isn't it?

Mr. Constable: That is correct, your Honor. [40]

The Court: That is a Federal statute?

Mr. Constable: Yes. We have stipulated that the parties to that Mexican marriage and divorce were residents of California during 1950. I would like to offer to stipulate that they were also domiciled in California.

Mr. Shearer: I think without question they were.

The Court: All right.

Mr. Shearer: So stipulate.

Mr. Constable: In regard to the transferee payment, that is in Docket 51227.

The Court: Is that the one where there was a question about the deductibility for interest?

Mr. Constable: That is correct, your Honor.

The Court: Well, I think the petitioners' counsel referred to the proposition——

Mr. Constable: I am trying to locate the 90-Day Letter.

The Court: Oh, I see. Do you have that docket number?

Mr. Shearer: That is, the first docket?

The Court: 51227.

Mr. Shearer: 26.

The Court: 27.

Mr. Shearer: Oh, 27 then.

Mr. Constable: In that issue petitioner and Robbins [41] were involved in litigation wherein they were alleged to be transferees of a certain organization, and it seems that petitioner Gersten made a payment in connection with that transferee liability. Now, in 1949 when the payment in question was made, we have stipulated that at a certain date the other party, Robbins, was insolvent. And so respondent determined that half of the amount paid by petitioner Gersten was a non-business bad debt which is to be treated as a short-term capital loss.

Now, that particular amount, for example, the payment was forty-seven hundred odd dollars. Respondent determined that half of that belonged to Robbins, was Robbins' liability, paid by petitioner Gersten when Robbins was insolvent. Therefore, half of the \$4,700 \$2,300 is a non-business bad debt of petitioner Gersten, and to be treated as a short-term capital loss.

Now, with regard to that part of the \$4,700 which applied to petitioner Gersten, respondent held that that part of it which related to other than interest

in the payment, which was \$1,700, is a long-term capital loss, and treated it accordingly; and that the difference between petitioner Gersten's one-half of the \$4,700, which was \$2,300, the difference between the \$1,700 which respondent treated as a long-term capital loss and the \$2,300, or 630, which was interest, was allowed as a deduction for interest paid. Now, that's the basis. [42]

The Court: Respondent didn't allow the portion of the interest that was applicable to the other man's part of it, did he?

Mr. Constable: No, your Honor. Respondent took the entire amount, the entire one-half applicable to Robbins, and treated it as a loan to Robbins and as a bad debt and treated it as a short-term capital loss.

The Court: Well, you gentlemen are going to have your work cut out for you on briefs on that point because, whereas it didn't used to make any difference, now with all the scrambling over capital treatment, capital gains and capital loss treatment, a lot of new contentions and some new philosophies are creeping in.

The one comparable situation, early, was the matter of bank stock assessments, where a bank went insolvent; originally it didn't make too much difference. Even though everything was gone, they didn't have anything left when the assessment was paid. It was a loss and that was that. In more recent years there has been quite a scramble over whether or not that should be treated as part of the cost of stock when, as a matter of fact, they

knew when they were paying it they weren't acquiring anything, because what they were supposed to be acquiring was already gone. We have had cases on that from that angle, and my recollection is that Murphy group, I believe, and some others about that time; we held that cost of stock. [43] On the other hand, in the case of a deceased potential debtor in the Agnes Fox case, the Second Circuit was of a view that since the man was dead and the payment was a payment after secondary obligation, that it was a payment to protect property and was a loss, and came under that provision of the statute and not under the theoretical, arising from a debt and a bad-debt loss.

So as to just where the courts are going to come out and what is going to be settled law on it, I am frank to say I don't know as yet, so you gentlemen will be expected to enlighten the Court with everything that there is on it, in this modern attitude, that is, the current attitude toward these questions.

Mr. Constable: Now, in Albert Gersten 51226 there is a point there I think we should mention, your Honor. The parties have agreed to do something that, in their stipulation, I am not sure we can do without permission of the Court.

In the stipulation, paragraph 57, we say that petitioner reported his one-half interest in land received from the liquidation of Rex Land Company, referred to herein as paragraphs 36 and 37 of the fair market value of \$118,000. Now, this land is something that was distributed to the stockholders at the time of dissolution of one of these corpora-

tions, Rex, in addition to the contracts that were distributed. Now, the value of 118,000 was reported. The notice of deficiency does not disturb that valuation and the petition doesn't disturb [44] it. However, we are agreed in our stipulation to change it; that is, we are agreed to raise the issue, to allow the issue to be raised, decrease the valuation to \$107,675. In other words, we are raising the issue and then agreeing on it, and I am not sure whether we need the Court's permission or not. It is something that will, if granted by the Court, be taken into account under Rule 50.

The Court: I don't see what the Court has to do about it, if you fellows agree that that is what it is.

Mr. Constable: My point was, the issue has never been raised and we wanted to make clear that we are making it part of the——

The Court: I would have no problem about it.

Mr. Constable: That problem is also common in 51228.

The Court: Particularly since you say you have raised it and agreed on the disposition of it.

Mr. Constable: That is correct, your Honor.

The Court: All right.

Mr. Constable: Now, in the stockholders' dockets, 51226, 51228, 51229, there is a little tag end that hasn't been agreed upon, and I think Mr. Shearer will stipulate that in the notice of deficiency, page 3, attached to the petition in Docket 51226 the determination relative to the refundable deposit of \$378 in item 2, and the determination as to the

value of a State tax claim of \$126.80 in item 3 are conceded [45] by the petitioner.

Mr. Shearer: Yes, your Honor. But let the record be clear that that refundable deposit has nothing to do with the payment in connection with the San Gabriel. That phrase has been used before in connection with that.

The Court: All right, the record will show the agreement.

Mr. Constable: In Docket 51228, referring to the deficiency notice attached to the petition in that docket, page 4, respondent offers to stipulate that petitioner concedes the refundable deposit item of \$378 and the State tax claim item of \$126.80 referred to in item A on page 4.

Mr. Shearer: So stipulated.

The Court: That is comparable to the other one?

Mr. Shearer: Yes, your Honor.

Mr. Constable: In Docket 51229, similarly, respondent offers to stipulate that in the notice of deficiency attached to the petition in that docket, page 2, the determination with regard to the refundable deposit of \$189 in item A is correct.

Mr. Shearer: So stipulated.

The Court: All right.

Mr. Constable: Now, your Honor, I have another little item. Respondent offers to stipulate that on or about March 13, 1950 a contract marked Exhibit 4 was entered into between Whittier Development Company and San Gabriel Valley Water [46] Company which concerned the installation of water

pipe lines to tract No. 14001. This contract is referred to on the books of the water company as Job No. 603W, and that a transcript of the 241 ledger of the San Gabriel Valley Water Company for Job No. 603 W is as shown on what is marked Exhibit 8.

That is the end of the offer to stipulate.

Mr. Shearer: In that connection, your Honor, I will, subject to the language that appears at the beginning of the written stipulation, reserving the right to object to the materiality, join in the stipulation.

The Court: In other words, you agree to the correctness of it but reserve the right to object on the ground that it is immaterial?

Mr. Shearer: Yes, your Honor.

The Court: Very well.

Mr. Constable: Your Honor, it may be that in brief the parties or one of them may wish to argue in terms of present values of annuities. For the record I would like to make an offer to stipulate to Mr. Shearer very briefly on the present value of an annuity subject to his checking it later.

The Court: What do annuities have to do—you mean present value of a dollar on a given date?

Mr. Constable: The present value, your Honor, of an annuity payable over a period of, say, nine years.

The Court: Well, go ahead with your statement.

Mr. Constable: Respondent offers to stipulate that the present value of the dollar per annum for a period of nine years, based upon interest earn-

ings at the rate of 5 per cent, is \$7.108, and the present value of 70 cents per annum for a period of nine years at 5 per cent interest is \$4.97. The offer to stipulate is made into the record for the purpose of encouraging counsel for the petitioner to, at a date subsequent to trial and before briefs, agree on this present value or other present values.

That is the end of the offer to stipulate.

Mr. Shearer: I would like to reserve answer. I am not prepared to make that stipulation at this time. I am not sure——

The Court: I think you better get together and let's get it settled one way or the other by the end of the trial.

Mr. Shearer: I think so, your Honor.

The Court: All right.

Mr. Constable: One matter, your Honor: I don't know yet whether I am going to be required to call an expert. I don't think so and I hope not.

The Court: What does that have reference to?

Mr. Constable: Well, your Honor, there has been some reference made that we can finish this case today, and I think we may be able to. However, my expert can not be here until Monday. [48]

The Court: I won't have any room for him Monday. I might have room for him tomorrow if we have to.

Mr. Constable: That would be agreeable with me if it would be agreeable with Mr. Shearer.

Mr. Shearer: It is agreeable with me.

The Court: We will have to see what the situation is. What do you want an expert for?

Mr. Constable: Your Honor, as my case stands, I don't think that I will need one, but I don't know what Mr. Shearer is going to do.

The Court: What is it you are going to value?

Mr. Constable: I am going to attempt to value nothing, because we have our presumption, of course. But I don't know what Mr. Shearer is going to offer.

The Court: Let's cross the bridge when we come to it.

Mr. Constable: Very well.

One remaining item in, for example, Docket 51228 at paragraph 5 (h). Well, I think, your Honor, in view of the discussion with counsel, that my remarks just made with relation to Docket 51228 can be stricken.

The Court: All right.

Mr. Constable: We prepared about 80 paragraphs of facts, your Honor, and I forgot the simple fact of putting in the returns. At this time I would like to stipulate that the [49] returns for the individual petitioners may be received into evidence as follows: Albert Gersten, Lucille Gersten, 1949, Exhibit Q; Albert Gersten, Bernice Ann Gersten, 1950, Exhibit R; Myron P. Beck and Ann H. Beck, 1949, Exhibit S; Myron P. Beck, Ann H. Beck, 1950, Exhibit T; Milton Gersten and Mary Gersten, 1950, Exhibit U.

That is the end of that offer to stipulate. Is that so stipulated?

Mr. Shearer: I so stipulate. Because I don't

know the purpose of the proposed Exhibit S, I will reserve the right to object to its materiality.

The Court: All right.

Mr. Constable: S is a return for the year in which a determination is made, your Honor, but not contested.

The Court: I see.

Mr. Constable: Another offer to stipulate: Respondent offers to stipulate that on or about January 20, 1953 petitioners Albert and Lucille Gersten and petitioners Myron P. and Ann H. Beck signed consents extending the period of limitation upon the assessment of income and profits tax for the year 1949 to June 30, 1954.

Mr. Shearer: So stipulated.

The Court: Very well.

Mr. Constable: That is all I have, your Honor.

The Court: We will adjourn until 2:00 o'clock.

(Whereupon, at 12:45 p.m. a recess was taken until 2:00 p.m.) [50]

Afternoon Session. 2:00 P.M.

The Court: Proceed.

Mr. Constable: May I have just a moment for some details?

The Court: Yes.

Mr. Constable: First we have a stipulation of fact which I will offer for filing.

The Court: The stipulation will be received and made a part of the record.

Mr. Shearer: If your Honor please, in connection with the stipulation of facts, by its terms, the

stipulation reserves the right to object to materiality of any fact herein stipulated.

Now, the difficulty here is the time of making such objection. It may well be that, and I can conceive even the probability, apart from this possible expert, that respondent will simply rest with the stipulation. For that reason I thought perhaps if I indicated the particular portions of it to which I did wish to object on the ground of immateriality, at this time——

The Court: Oh, yes, any objections to any part of it on any such ground, you make the objections and we will take a look at them now and clear the record on them.

Mr. Shearer: My objections are substantially all of the same kind and they go to paragraph 7, 8——

The Court: All right.

Mr. Shearer: If I may, I will enumerate the other paragraphs which are all a similar type of paragraph: 7, 8, 20, 30 and 41; and also the exhibit which counsel put in on oral stipulation. I don't know what letter was assigned to that—Exhibit 8. Now, I might clarify this by stating that, for the purpose of the individual cases, I can see where certain of the payments made—I'm sorry, I said "individual cases;" I meant corporate cases. In connection with the reflection of income of those corporations, the payments made prior to their dissolution would be material, and my objection does not run to those items. However, the entire list is compiled as a single list for convenience, with the understanding that that convenience would not preju-

dice my objection. I can enumerate the specific points from which my objection runs or I can state it in general, that all payments made—I object on the ground of immateriality to the receipt into evidence of all payments made subsequent to the dissolution of the corporations.

The Court: I think I had better get an explanation of these accounts. The paragraphs mentioned appear to be transcripts of ledger account in the books of the water company.

Mr. Shearer: Yes, Your Honor.

The Court: And I would like to have some explanation of these entries in this account as to what they are per [52] books.

Mr. Shearer: If I follow Your Honor, I might say that the column “Credits” represents an amount equivalent to that originally paid to the water company. The column entitled “Charges” represents the payments made by the water company to the subdivider or to the owner of the contract, as the case may be, if the contract were assigned. The balance is simply a mathematical subtraction of the amount paid from the next preceding balance.

The Court: Let me get at it this way: Is it a proper interpretation to say that the first one, being in paragraph 7, the account being, as I understand, credited to Job No. 363W?

Mr. Shearer: Yes.

The Court: That job, which was the construction of water mains up to one of these subdivisions by the water company, was credited with the payment of 23,764?

Mr. Shearer: Yes, Your Honor.

The Court: And then that was charged out, leaving balances as payments were made back over the period of time and as the water was used by the tenants, is that right?

Mr. Shearer: Yes, Your Honor. I may say that the date reflects the date of payment by the water company and not the dates——

The Court: The amounts under "Charges" so that the over-all situation is that in terms of water companies the way [53] one interpretation might be, that it was charging itself with 23,764 and was reflecting satisfaction of that by these various payments on the dates mentioned, leaving the balance as shown in that particular one at December 1954 at 12,999.26.

Mr. Shearer: That would be an interpretation on the basis of the information to this point. It is my understanding, and the evidence, I believe, will show, that they set these up as what they called contingent liabilities, and I don't want to lose sight of that fact.

The Court: I am not trying to get any admission or statement here which by way of impingement overcomes the contention that you are making in the over-all case. I am just trying to get a fair reading of the Act as it is carried by the water company without regard to whether that would be or indicate a proper legal result as between the water company and these individuals or the company or not. The remaining question that comes up,

and which might be one that when a consideration of the proper treatment of such an account is given, would be what would be the entry in an account such as this on the books of the water company if, after ten years had run from the opening—and that was November 21, 1947 I believe in that particular one——

Mr. Shearer: Yes, Your Honor.

The Court: If, at the end of ten years, say, the balance column showed a \$3,500 balance in there?

Mr. Shearer: Well, I don't wish to give evidence from the counsel table, but the evidence, I think, will show that that is put into what is called a donations account.

The Court: On the books of the water company?

Mr. Shearer: Yes.

The Court: At the end of that time they would clear this account by taking the balance somewhere else?

Mr. Shearer: Into a donations account, and the reason, they use that phrase as meaning in relation to the requirements of the California Public Utilities Commission, of the treatment of that amount as allowed capital or whether they are entitled to return of it for the purpose of rate-setting and so forth, and therefore it goes into what is called a donations account. And without question at that stage, there are absolutely no rights which the subdivider has in the——

The Court: I understand.

Mr. Shearer: On the other hand, the water com-

pany is required to keep that separately in order for another purpose, that is, the purpose of rate setting.

The Court: Might become of some interest directly or indirectly as to how it is treated in making out the income tax return. So I merely mention that at this stage because the Court may have to face some consideration of that proposition in reading this stipulation. So you will bear that in mind, and if it is regarded by counsel as requiring any [55] consideration or being dealt with in the course of the trial, you may do so; and after that, on briefs, if it is regarded as material.

Now, you object on the ground of immateriality, and what is the basis of the claim that it is immaterial?

Mr. Shearer: The issue here, Your Honor, relates to what is to be done with respect to the payment in the year in question. All entries, for example, in paragraph 7, all entries subsequent to the entry under date of 6/14/1950 relate to transactions which do not affect—I shouldn't use that—which do not at least directly affect on the books of the company, which is no longer in existence, its income or outgo.

Now, what its stockholders subsequently receive, we submit, is not material and has no relationship—can not affect the right or the lack of right of the company to treat this payment as a cost of goods sold, and for that reason the evidence does not tend to prove or disprove any of the matters in connection with this issue.

It is my understanding that this is not offered with relation to anything but the corporate issue.

The Court: Well, it is in here as a fact, and I think that, rather obviously, certainly, up through these tax years that are involved, there can be no question that it is material. Now, there might be some question as to the weight that is to be given to it in arriving at the question as to [56] the proper effect on income and arriving at net income of these petitioners. But I think that certainly up through these taxable years the contention that it is immaterial is not well taken, and in any event I will overrule the objection.

Mr. Shearer: I conceded up to the years in question.

The Court: Well, the objection will be overruled.

Mr. Shearer: I will enumerate other paragraphs that have the same language relating to the different taxpayers: 12, 23, 34, and 44. I have no objection. I simply wish to call the attention of the Court to the fact that the conversation this morning, the discussion this morning brought to my attention that perhaps the use of the word "deductibility" might appear to have a technical meaning in paragraph 12. That was not our intent.

The Court: A very unfortunate selection of a word.

Mr. Shearer: Yes, and that was——

The Court: In the light of the statement of the issues.

Mr. Shearer: Yes, Your Honor, and that of course is what caused me to mention it.

The Court: All right. As I understand it, then, the parties would have me read it as a question as to whether or not it is to be taken into account in determining cost basis?

Mr. Shearer: Yes, Your Honor. [57]

The Court: To the corporate taxpayer, because I don't understand the claim of deductions is being asked here.

Mr. Shearer: That is right.

The Court: All right.

Mr. Constable: May I inquire of the Court, what the Court is referring to in "cost basis"?

The Court: Well, this 12 has to do with the amount paid by J. Richard Company to the water company for running water pipe lines into this development, and there is an indication in the use of the term "deductibility," and if that were, the question were whether or not it was an item of deduction under the statute in arriving at net income—and I don't understand that there is any such claim on the part of the petitioner at all—a deduction is a matter of legislative grace covered by Section 23 of the Code of 1939, whereas a matter of cost goes into the basis in arriving at the amount of gain that is to go into gross income under Section 22 of the Internal Revenue Code of 1939; a wholly different thing. And the word "deductibility" is very bad to use it in that sense because of the confusion that it does give rise to. And it is rather amazing to me the number of times that I find where it is loosely used. It is always well to avoid the use of a word where, under the Code or statute

to be applied, it has its own special statutory meaning. And I am glad that attention has been called to it, because we will read it in light of the [58] statement of the issue here.

Mr. Shearer: Is that satisfactory?

Mr. Constable: Yes. I might add, paragraph 72 sheds some light on that.

The Court: If there are any others I think it would be well to——

Mr. Shearer: I enumerated the other paragraphs.

The Court: All right, you may proceed.

Mr. Shearer: Mr. Moseley, please.

Mr. Constable: May I continue? I had another item.

The Court: All right.

Mr. Constable: This morning certain returns were stipulated into evidence, marked Exhibits Q, R, S, T, and U. The Clerk has asked me, for the record, to hand them to him for marking.

The Court: All right. When they are offered, they will be given the designations indicated.

The Clerk: Q through U in evidence for the respondent.

(Respondent's Exhibits Q through U were marked for identification and received in evidence.)

Mr. Constable: And the same applies to what was stipulated this morning as Exhibit 8.

The Clerk: Exhibit 8 for the petitioners. [59]

(Petitioners' Exhibit No. 8 was marked for identification and received in evidence.)

Mr. Constable: This morning, in offering to stipulate the consents for Albert and Lucille Gersten and Myron P. and Ann H. Beck, counsel inadvertently forgot to assign respective exhibit numbers. I will hand the consent of Albert and Lucille Gersten to the Clerk to be marked V.

The Clerk: Exhibit V for respondent.

(Respondent's Exhibit V was marked for identification and received in evidence.)

Mr. Constable: And Beck, to be marked W.

The Court: Very well.

The Clerk: W.

(Respondent's Exhibit W was marked for identification and received in evidence.)

Mr. Constable: Your Honor, is it in order to move that the cases be consolidated? I am not sure that we have——

The Court: I am regarding them as consolidated for the purposes of the proceeding here.

Mr. Constable: Your Honor, I think I will wait until we conclude before proceeding to ask for permission to withdraw all the various exhibits.

The Court: Very well. [60]

Mr. Shearer: Mr. Moseley, please.

M. E. MOSELEY

was called as a witness by and on behalf of the petitioners, and, having been first duly sworn, was examined and testified as follows:

The Clerk: Tell us your name, please, Mr. Witness.

The Witness: M. E. Moseley.

Direct Examination

Q. (By Mr. Shearer): Will you state your occupation? A. I am an engineer.

Q. What is your present employment?

A. I am vice-president of San Gabriel Valley Water Company.

Q. Are you also the general manager of that company? A. Yes, sir.

Q. How long have you been with San Gabriel in an executive capacity?

A. With San Gabriel and its predecessor, since 1937.

Q. Is San Gabriel a private corporation?

A. Yes, public utility under the California Public Utilities Commission.

Q. I show you Exhibits 1 through 7, inclusive, which are water contracts, apparently executed by you on behalf of San Gabriel. Are you familiar with those? [61] A. I am.

Q. Now, did you negotiate those particular contracts with the respective subdividers?

A. I did.

Q. Did you participate in the fixing of the amount called for which the respective contracts

(Testimony of M. E. Moseley.)

called for payment to San Gabriel? A. I did.

Q. How were those amounts arrived at?

A. The amounts represent the cost of the facilities which are required to be installed, and the facilities that are required are determined by the water company after an engineering study.

Q. Are you generally in charge of negotiating that type of contract for San Gabriel?

A. Yes, I am.

Q. Approximately how many of such contracts have you worked on and seen in connection with your employment?

A. That is difficult to say. It is a great number. It might be 500 or perhaps a thousand.

Q. Do those contracts always contain what I will call a refund provision? A. Yes, they do.

Q. The language you will note is somewhat different in each of the contracts, but the substance is the same. Is [62] there any reason why the refunds and their rates are more or less uniform in the various contracts?

A. Well, the contract and the refund rates are prescribed by the Public Utilities Commission. They have prescribed changes in rules from time to time.

Q. And each of those contracts, then, conformed to the rules then existing at the time of the California Public Utilities Commission?

A. That is correct.

Q. Now, who actually makes the water pipe installation?

(Testimony of M. E. Moseley.)

A. The water company does, or it employs a contractor to do it under its direction and supervision.

Q. The subdivider has nothing to do with it beyond the payment, is that correct?

A. That is correct.

Q. Now, are these pipe lines generally installed in that portion of the subdivisions which are dedicated to public streets? A. Yes.

Q. Is that true in the specific subdivisions referred to in contracts which are Exhibits 1 to 7?

A. I think that is true with the exception of minor instances.

The Court: Are you talking about the connections and the lines after they reach the subdivision?

The Witness: Yes, within the subdivision. [63]

Q. (By Mr. Shearer): The water mains actually are laid in the subdivisions themselves, are they not?

A. Yes, a subdivision consisting of lots and streets.

Q. And they are generally, in this case you said except for minor instances, in the street portion of the subdivision? A. That is correct.

Q. You do not have anything to do with the connection from that water line to the house itself?

A. Yes, we extend a connection from what are commonly called water mains to a meter box, which will be near or at the property line, the property line being the limits of the public street.

The Court: Right at this point let me see if we can clear up one matter, since it is a matter that

(Testimony of M. E. Moseley.)

I don't think there should be any dispute about, and maybe we can clear it up by mentioning:

Now, am I to understand that in these four instances that the water lines or mains, the cost of which is here involved, are the lines or mains that are within the confines of the subdivision, or does it likewise involve, for instance, if an existing water main runs within a quarter of a mile of a subdivision, that part of the main which it takes to run that quarter of a mile before it reaches the boundary of the subdivision? Do we have one or both or none of those? [64]

A. Well, the one we are just discussing certainly is an important element in the cost of the installation. A subdivision may be started, and it may be fortunate and have a water main entirely along one frontage. It might not have any internal streets at all.

The Court: Might not have what?

The Witness: Any internal streets. A piece of land might be subdivided with a pipe line already alongside of it. Off-site distance certainly has a good deal to do about it. The particular layout of the subdivision has a great deal to do with it, from an engineering standpoint, in determining the size of the pipe lines that are involved.

Q. (By Mr. Shearer): When you speak of layout, would that include the width of the streets?

A. Yes.

Q. Would that have any bearing upon the cost?

A. Well, our company doesn't lay—lays two

(Testimony of M. E. Moseley.)

pipe lines on a street, if the street exceeds 70 feet in width, one on either side.

Q. Now, would the pattern of the layout of streets within the tract have any bearing upon the cost?

A. Yes. Am I supposed to continue? Did you ask me a general question?

Q. Yes, if you would have other factors, if you would [65-66] simply give them to us.

A. Other things that would be considered from an engineering standpoint are soil conditions, the type of pipe that would be laid to fit, suitable for those soil conditions, which then revolves into—is an element of cost, finally.

Q. Will you explain that a little?

The Court: Let me ask a question right there, because I don't know that I follow. You say "from an engineering standpoint." Are you using that as something distinctive and different from cost standpoint? When you speak about "engineering standpoint," are you talking about cost?

The Witness: I think cost follows the engineering.

The Court: I just want to know what you mean, is all I want to know, because you seemed to be very carefully referring to it in your answers, to matters from an engineering standpoint, and I think that, primarily, the question here is directed to cost.

The Witness: All right. I think I know what you mean. From a long-range cost standpoint, it

(Testimony of M. E. Moseley.)

would not be good engineering to put in a pipe line which will not survive in a particular soil, and it might be well from a short-range standpoint to put in a pipe line which wouldn't stand a particular corrosive soil condition, but in long-range cost you must fit the material to the conditions you have, and some of those are different. [67]

The Court: Now you are bringing in another matter that I don't know what you mean, when you are referring to "from an engineering standpoint", and now you are talking about a long-range cost standpoint.

Q. (By Mr. Shearer): Who determines what kind of pipe materials are laid?

A. The water company.

Q. And some materials are more expensive than others, are they not? A. That is correct.

Q. In given cases do you determine whether a more expensive material be laid because in your opinion the particular soil will not properly take the cheaper—— A. Yes.

Q. One of the elements——

The Court: I think it would be better if you will ask him the questions instead of giving him the answer in the question.

Mr. Shearer: Yes, your Honor. I thought I understood what he had said and was trying to translate it.

The Court: Well, I believe he better translate it.

Q. (By Mr. Shearer): Of the factors you have

(Testimony of M. E. Moseley.)

mentioned which affect the cost of the installation, do any of those have any bearing upon the amount of water which is used in connection with that installation? [68] A. No.

The Court: What do you mean by that?

The Witness: Are you asking me?

The Court: Yes.

The Witness: The cost of the pipe line in front of a dwelling or lots wouldn't have anything to do with the quantity of water which an individual householder used, unless it should be that the pipe line were so small that he were unable to use the quantity of water that he wished to use and they wouldn't supply it.

The Court: In other words, it is the size of the pipe line and not the cost?

The Witness: Yes, sir; and size and cost are directly related.

Q. (By Mr. Shearer): Would the fact that a subdivision's water pipe installation cost was greater because of a long distance from the water company's then existing facilities have any bearing upon the amount of water used in that subdivision?

A. No, I don't think it would.

Q. Does the nature of the pipe materials used have any bearing upon the amount of the water used? A. No.

Q. What factors do affect the amount of water used in a given subdivision? [69]

A. Oh, size of lots, which means increased vege-

(Testimony of M. E. Moseley.)

tation around the outside of a house, weather, certainly pride of ownership.

Q. Will you explain that "weather," what you mean by the "weather"?

A. Water companies don't sell much water in cold or wet weather.

Q. Any other factor?

A. I think that's all.

The Court: You mentioned something there.

I would like for you to read back that answer.

Reporter (Reading): "Answer: Oh, size of lots, which means increased vegetation around the outside of a house, weather, certainly pride of ownership."

The Court: What do you mean by "pride"; p-r-i-d-e?

The Witness: Yes. I mean the general appearance of a neighborhood, people that live there, whether or not they use water to keep their places appearing well or whether they don't.

The Court: All right.

Q. (By Mr. Shearer): Do you find that some tracts will use a greater amount of water for that purpose than others?

A. Not tracts, particularly, but areas do.

Q. In relation to the full ten-year period involved in [70] these contracts—does your occupancy vary during the ten-year period.

A. Yes, occupancy does vary.

Mr. Constable: Your Honor, I have objected maybe a little late. I think Mr. Shearer's ques-

(Testimony of M. E. Moseley.)

tioning was directed to these contracts. I would like to know—he has talked about a thousand contracts, and then we have some contracts in issue, and I am not sure which he is talking about here.

The Court: I am not either.

Q. (By Mr. Shearer): Do you understand my question to relate generally to all of the subdivision which San Gabriel services?

A. I think it will refer to any place we serve, any tracts or any areas.

Q. Was your answer intended to reflect that?

A. That's correct.

Q. Now, speaking as of the commencement of the installation of water pipes, pursuant to any one of the contracts, Exhibits 1 through 7, or any similar contract, can you predict how much, if any, of the water pipe payments may be refunded?

A. No.

The Court: Did you ever try?

The Witness: No, I don't think I have. I have thought about it. I don't think in the strictest sense I have tried to make a prediction of what would happen in these contracts, [71] because I don't know what the subdivider is going to do.

Q. (By Mr. Shearer): Insofar as the ten-year period is concerned, that of course starts not later than the completion of the installation?

Mr. Constable: Objection, your Honor.

Mr. Shearer: This is preliminary. I am stating what is in the stipulation.

Mr. Constable: I think that some of the con-

(Testimony of M. E. Moseley.)

tracts, Mr. Shearer, read "from date of completion."

Mr. Shearer: I think I said "not later than the completion of the installation."

Mr. Constable: All right.

A. That is true.

Q. (By Mr. Shearer): There is a period between that time and substantial occupancy during which your sales of water are comparatively limited, are they not? A. That is correct.

Q. Have you found that time to vary from subdivision to subdivision? A. It does vary.

Q. Is the variance substantial?

A. Yes, it is.

The Court: You are speaking of which time? We have had [72] times that were—you said you were there from 1937. Well, certainly the experiences of most any subdivider in 1937 are quite different from his experiences after World War 2, for instance, possibly during World War 2. We have had, I rather imagine, quite a range of extremes.

The Witness: Yes, sir.

The Court: So now what are you talking about?

The Witness: Well, I am not talking about 1937. I have made some inquiry——

The Court: This better be about your experience, not inquiry.

The Witness: My own company? May I put it this way: I asked questions about the experience with our contracts of people in our accounting department within the last few days, and that is the answer I propose to give.

(Testimony of M. E. Moseley.)

The Court: You know what periods they were telling you about when you asked them?

The Witness: The contracts that they were speaking of are still on the books. They have not been cancelled because of expiration of the ten-year period. I am not familiar with the particular conditions in respect to those contracts. But I did ask as to the variance in refund rate.

Mr. Shearer: May I proceed?

The Court: Yes, go ahead. [73]

Q. (By Mr. Shearer): Has there been, commencing from say 1948, a danger of loss of occupancy by destruction of homes by reason of condemnation?

A. My company has experienced that, due to the building of freeways.

Q. You know——

A. And to the construction of a flood control project.

Q. Mr. Moseley, speaking of a period of time after June, 1949, and not later than December 31, 1950, do you know of any sales of rights to receive refunds under contracts similar to Exhibits 1 through 7 which were issued by your company?

(Question read.)

A. I know of some sales, but I can't pin them down as to the time at this moment.

Q. Do you know approximately how many sales were made, that is, that you know of?

A. I know of, I believe, four contracts that have been sold.

(Testimony of M. E. Moseley.)

Q. Now, did those relate to subdivisions which had been completely occupied, that is, were completed as far as subdivision was concerned?

The Court: Which do you mean, occupied or completed?

Mr. Shearer: Strike the question and I will rephrase it.

Q. (By Mr. Shearer): Did those refer to subdivisions in respect of which [74] the homes had been completely or substantially completely built?

A. Three of them were substantially or completely built and one was not.

Q. Can you tell us approximately how many such contracts were then existing in that period to which I have referred?

A. I don't know that these were sold during that period. They may have been sold more recently than that.

Q. My question was directed to the period.

A. I told you that I knew of the sale of four contracts, but I couldn't tell you as to the time, whether they were sold during that period or not; I can't tell.

Q. Can you tell us approximately how many such contracts you had on your books between June of 1949 and the end of 1950?

The Court: Now, before you get into that, I don't know just what you are going to ask me to find from an answer to that question. I can't tell at this stage. But if it is something that is material, and important, to your case, or you think it

(Testimony of M. E. Moseley.)

is, that is something that shouldn't be asked of this witness here, to approximate, when all you would have to do is have them check and find out what it was from the records of the company. I want to allow you all the latitude in the world in the presentation of your case, but questions like that can present a terrifically burdensome duty to the Court, in the light of some arguments that are later made. Now, I mention [75] that at this time while we are still early in this proceeding, because undoubtedly those things are a matter of record, and this witness has indicated that he worked in connection with 500 or a thousand such matters, and I just don't like to be handed such an indefinite sort of a burden, when he is just being asked to approximate something that could have been determined from records.

Mr. Shearer: I would be perfectly willing to have the witness confirm it, and stipulate. But I must say there are times when given material is not sought because it doesn't appear to be necessary, and then turns out to be advisable because of an answer a witness has made.

The Court: This is a matter that is the responsibility of an attorney in the preparation of his case.

Mr. Shearer: Yes, your Honor.

The Court: We have provision which requires counsel to go into those things ahead of trial and to get record facts.

Now, I know that you have had here a rather complicated situation in that you have corporation

(Testimony of M. E. Moseley.)

cases, you have the individual stockholder cases, and then you have little side issues of individual petitioners, and you have had, undoubtedly, a very burdensome case to work up, and I am perfectly aware, and I think you are to be commended, from your demonstration here already that you gentlemen have been working at it. But if this is important, this witness very obviously doesn't know [76] the answer to that sort of thing, other than just some approximation, when, as a matter of fact, it is a matter of record. And it is better to have it right than it is to have something indefinite that I am going to have to struggle with and don't know what the answer will be to it when I struggle with it.

Mr. Shearer: Well, unless counsel is willing to stipulate that the witness may verify the specific fact, and it may be offered, I have no way of getting the exact information at this time.

The Court: You have no way of getting the exact information at this time, apparently, because this witness indicated he doesn't know, and you are just asking him to approximate matters that are rather obviously of record with the water company.

All right, let's get back to the question.

Will you please read the question?

Reporter (Reading): "Question: Can you tell us approximately how many such contracts you had on your books between June of 1949 and the end of 1950?"

A. We had several hundred.

(Testimony of M. E. Moseley.)

Mr. Constable: Your Honor, that is rather indefinite. We have got a long period of time.

The Court: Are you objecting and moving to strike or what?

Mr. Constable: Yes, I object and move that the answer be stricken. [77]

The Court: The motion is granted.

Mr. Shearer: If your Honor will withdraw his ruling for a moment, I would like to call your attention to the fact that, in my opinion, this witness has been qualified as an expert; with relation to this specific matter, he may well be able to state unqualifiedly, and the question was so directed, "Can you state a minimum amount?"

The Court: That wasn't the question, and I don't know whether it would make it any better if it was.

Mr. Shearer: I didn't mean the minimum amount. I asked the question, "Can you state the approximate number?" And his answer related to a minimum amount, which might be helpful to the Court in trying to determine a question of four possible sales among at least several hundred.

It may be my case will be stronger if I had the exact amount and it was a thousand.

The Court: It may be, so let's get the exact amount.

Mr. Shearer: Your Honor, I have no way of getting the exact amount unless I ask your Honor to hold this matter open until Monday, which I am not disposed to do at this point.

(Testimony of M. E. Moseley.)

I have already invited counsel to stipulate with me the exact amount, and I have had no response.

The Court: I have made my ruling, so let's move on with the case, because this Court has too many burdensome matters to have to struggle over those things which are approximations [78] of matters that are of record and can be established, and I don't think it goes to the qualifications of this witness as an expert at all. It has to do with the business of this company, the business on its books.

All right, let's go on.

Q. (By Mr. Shearer): Mr. Moseley, in connection with the accounts of what is called your 241 ledger, have you seen that book? A. Yes, sir.

Q. Are you familiar with the fact that from time to time there are accounts in the 241 ledger which do not pay out prior to the expiration period? A. Yes, sir.

Q. What happens, how do you treat the unrepaid amount?

A. The amount that is not repaid is transferred to an account called "Donations in aid of construction."

The Court: Donations what?

The Witness: "Donations in aid of construction." The California Public Utilities Commission prescribed a new system and classification of accounts effective as of January, 1955. The present account, the new account for these contracts during their life is called 241; I believe the title

(Testimony of M. E. Moseley.)

of it is "Consumers' advances" or "Customers' advances for construction." The other account, into which any remaining amount goes—I don't have in mind the number—but it is still called donations, [79] as it once was. That donations account, under the present treatment, appears in the liabilities side of the ledger as a liability. The Commission treats it almost as an asset that does not exist. It is not a part of rate base, and it is now being written off like depreciation but not charged to depreciation.

The Court: In making that answer, are you talking about the way your accounts are kept for the purposes of meeting the requirements of the Utilities Commission? Is that what you are talking about?

The Witness: Yes, sir. First, there is a—federally, they are kept another way, for the purpose of Federal taxes, I believe.

Q. (By Mr. Shearer): Mr. Moseley, the change came when, did you say? A. January, 1955.

Q. '55? A. Yes.

Q. And did you not use these two new accounts prior to that time?

A. They were practically the same accounts: 241 was called 28A. I believe it has the same title, and "Donations" was 28B. I can't think—

Q. You used the word "Donations"; before you used the word "Donations in aid of construction." Are you simply [80] shortening the phrase?

A. Yes.

(Testimony of M. E. Moseley.)

Q. When you said it the second time?

A. That's right.

The Court: That is the account which you carried any balance at the end of the required period, is that right?

The Witness: Yes, sir. We have taken that money and literally buried it in the ground in the form of pipe lines, and the way it is treated now by the Commission is that at the expiration of the period any unrefunded amount is actually a deduction, you might say, from the value of that pipe line.

Q. (By Mr. Shearer): When you say it isn't included in the rate base and wasn't, did you mean that it wasn't included in the rate base during the years in question here from '49, '50?

A. That is also true. It is not included in rate base.

Q. May I ask you what you mean by rate base? I don't know that this is material to our case, but you have used a phrase that I frankly don't understand.

A. Rate base is a phrase, I guess used by Commissions all over the country for the purpose of determining what assets of a company it may earn on, its fixed percentage of earnings, whatever the Commission uses.

Q. In other words, is it correct to state that they do not take into account any such unrefunded portions in determining [81] the rate of income

(Testimony of M. E. Moseley.)

you should earn on your capital investment; is that a correct statement?

A. They do not—that is correct. All unre-funded amounts, either amount that may be re-funded or amounts that have gone beyond the point where there will be no refunds, are deducted from the assets of the company in arriving at a rate base.

Mr. Shearer: I have no further questions.

The Court: Any questions?

Mr. Constable: May I have just about five minutes? I think I will be very brief with this witness.

The Court: Very well. We will take an intermission.

(Recess.)

Mr. Shearer: Before counsel starts cross examination, I would like to offer to stipulate that, as of any given date, the 1950's, of counsel's choosing—and I would suggest July 1st of 1950 as being a mean in connection with these cases—that San Gabriel had in effect a given number of contracts similar to Exhibits 1 through 7, relating to subdivisions, the given number to be furnished by San Gabriel from their records.

I understand counsel will consider that.

Mr. Constable: Your Honor, without being committed, of course, as I understand Mr. Shearer's offer, it is really in effect an offer to stipulate that we will stipulate. Well, now, we will do everything we can, and it is my opinion that this [82] thing should be a matter of fact, and I think we

(Testimony of M. E. Moseley.)

can agree on it. We will certainly cooperate with him and do everything we can to accommodate him.

The Court: All right.

Cross Examination

Q. (By Mr. Constable): Mr. Moseley, the water contracts which your company has with subdividers, wherein certain refunds or advances are provided, have for their purpose, do they not, the fact that the water companies by these contracts are then providing installations with funds provided by the contractor; isn't that correct? A. Yes.

Mr. Shearer: Will you read the question and answer, please?

(Record read.)

Q. (By Mr. Constable): Have you brought with you your 241 ledger for job No. 297-W?

A. Yes, sir.

Mr. Constable: Will you mark this exhibit?

The Clerk: X.

(Respondent's Exhibit X was marked for identification.)

Q. (By Mr. Constable): I will show you what is marked for identification as [83] Exhibit X. Counsel in this case will agree that Exhibit X is a transcript of your job 297-W. This is a contract, is it not, or the job number for a contract between San Gabriel Water Company with Albert Gersten and Myron P. Beck? A. That is correct.

Q. And what is the date of deposit, approximately?

(Testimony of M. E. Moseley.)

A. Approximately September 5, 1946 was the date of the contract. The deposit should have been reasonably close to that.

Mr. Shearer: May I move to strike for purposes of making an objection?

The Court: Yes.

Mr. Shearer: I object to this question on the ground it is immaterial to the issues here involved; for the Court's understanding, this does not relate to any of the specific transactions in issue, here in issue.

Mr. Constable: I might say, your Honor, if I could describe through the witness this contract, its effect, I will then offer it and counsel can object to its admission.

Mr. Shearer: If this is purely for description purposes, I will withdraw my objection. I did not want to be in a position of waiting too long to object.

The Court: All right.

Q. (By Mr. Constable): This contract, or this job No. 297-W, indicates that [84] the contract was made in September of '46, and that is similar in many respects, most respects, to Exhibits 1 through 7; that it expired in September of 1956, but that by October '54 it had paid out completely: is that correct?

Mr. Shearer: Just a moment. Now, I object to that question, and if counsel proposes to put this into evidence—he is first reading it into evidence and then he is going to put the exhibit in.

(Testimony of M. E. Moseley.)

so I am afraid I am going to have to object to the evidence that he is now seeking to elicit, which is simply a reading of this proposed exhibit.

Mr. Constable: All right, your Honor, I will withdraw my question. I can go about it another way.

The Court: All right.

Mr. Constable: At this time I am going to offer into evidence Exhibit X, your Honor. Now, this particular exhibit, counsel has stipulated with me that it is a true copy of job No. 297-W on the books of San Gabriel Valley Water. The document speaks for itself in many respects. It is a contract with the water company between Gersten. It is in prior years.

I might state that the amounts here involved or the contract represented by this document have no bearing on the computation of the deficiencies involved.

The Court: What is the purpose?

Mr. Constable: The purpose, your Honor, is to show that here we have a prior contract made by Albert Gersten, which [85] was made in September of '46, and by the end of 1950 had paid out in refunds 10,000 of the original 18,000. Now, the purpose is to show that by 1950 Mr. Gersten and Mr. Beek were aware that these particular contracts were paying out.

The Court: Might show that they could be aware that this one was.

Mr. Constable: We further have a stipulation,

(Testimony of M. E. Moseley.)

your Honor, from Mr. Shearer that this particular job number, this refers to a tract which is in the neighboring area of the other tracts in issue.

The Court: All right.

Mr. Shearer: I think you are incorrectly stating it—I may be wrong, there is so much here—but I think that is an incorrect statement of the stipulation.

Mr. Constable: Now, your Honor, let me give you the background on this. Of course, I at first offered to stipulate——

Mr. Shearer: Are you saying that it is part of the written stipulation or that I undertook to stipulate?

Mr. Constable: You stated that this was a true document. You stipulated that if it was material then you would stipulate that it was in the area of the tracts in issue.

Mr. Shearer: That is correct.

The Court: All right.

Mr. Shearer: I was confused. I thought that counsel was——

Mr. Constable: That is my offer. [86]

The Court: All right.

Have you stated your objection?

Mr. Shearer: I object on the grounds that this has no bearing, doesn't tend to prove or disprove any of the issues here involved.

The Court: The objection is overruled. It will be marked in evidence.

The Clerk: Exhibit X received.

(Testimony of M. E. Moseley.)

(Respondent's Exhibit X was received in evidence.)

Q. (By Mr. Constable): Mr. Moseley, referring to Exhibit X, are you able to determine approximately, as of December, 1950, whether that particular contract will pay out?

A. As of December, 1950?

Q. Yes. A. No.

Q. Mr. Moseley, from looking at the refunds which are coming in by year on the tract involved, or the refunds being paid per each year, isn't it possible to arrive at some sort of conclusion as to whether by the expiration date this contract will pay out?

A. If conditions stay as they were or are at the moment.

Q. At 1950? [87]

A. Yes, if conditions should stay that way, if the occupancy stays the same.

Q. If the occupancy stays the same. What other conditions must stay the same, Mr. Moseley?

A. Oh, I related things that would vary; refunds, weather, condition of properties, economic conditions certainly.

Q. Now, thinking back to, oh, during the period 1949 to 1950, barring the possibilities of depressions and floods and earthquakes and droughts, and ignoring the occupancy question, isn't it a conservative estimate to say that at least 70 per cent of the refunds will be made on the contracts which San Gabriel Water Company has with subdividers?

(Testimony of M. E. Moseley.)

Mr. Shearer: Will you read that question, please?

(Question read.)

Q. (By Mr. Constable): You may answer.

A. When I heard the question read, the lady said 70 per cent of the contracts which the water company has with subdividers. I don't know that that would be——

Mr. Constable: I believe I said, "Is it not a conservative estimate that 70 per cent of the refunds would be made under the contracts which San Gabriel had with its builders?"

The Witness: I believe it would be.

Mr. Constable: That is all, your Honor. [88]

Redirect Examination

Q. (By Mr. Shearer): Mr. Moseley, is your 70 per cent an average figure?

A. No. Oh, I beg your pardon.

Q. The 70 per cent answer you gave to the last question, are you giving that as an average figure?

A. That would be what it would amount to, I'd say.

Q. Do you believe that there will be some which will pay off less than 70 per cent?

A. You mean at this time or in 1950?

Q. Speaking as of 1950, with respect to the contract you then had, and having in mind the various factors you took into account——

A. Yes, some would pay off much less than 70 per cent.

(Testimony of M. E. Moseley.)

Q. Some would pay off at more than 70 per cent? A. Yes, sir.

Mr. Constable: I would object. I don't mind leading, but I hate to have to be bothered with it.

Mr. Shearer: I refrained—and perhaps that was where I made my error—from raising any question of whether counsel's questions were cross examination or whether counsel simply took over the witness and was using him as his own expert.

Mr. Constable: May I respond?

Mr. Shearer: I am directing my attention to new matters that counsel has raised, and I take it that in that respect I have some more latitude.

The Court: I think that the questions that were asked were cross; in the proper range of cross examination.

Q. (By Mr. Shearer): During the year 1950, Mr. Moseley, was it known the freeway was to go through or near the area in which San Gabriel serves?

A. Certain areas, yes; not this particular area.

Q. Well, when you say "this particular area," you mean Whittier Downs?

A. The vicinity of the subdivisions for which we made contracts with Mr. Gersten and his associates.

Q. Have you brought with you a map which counsel subpoenaed, relating to this area?

A. Yes, sir.

Mr. Shearer: Will you mark this for identification, please, Mr. Clerk?

(Testimony of M. E. Moseley.)

Your Honor is correct in referring to 8, but my recollection is that that was an exhibit offered by respondent; in fact, to which I had made unsuccessful——

The Court: Just hold the number, Mr. Clerk.

Mr. Constable: That is not correct, your Honor. Exhibit 8 was the copy of job 603, which is that Whittier contract made—we stipulated that that one may go into evidence.

Mr. Shearer: I stipulated as to form, and I stipulated with him just as I stipulated with respect to the job number— [90] that is in paragraph 7 and 8—so I am not questioning the propriety or the form. I am saying that, far from offering it, I objected to it, and although its prototypes were included in the stipulation at the request of counsel—and I do stipulate and do not withdraw my stipulation with respect to the accuracy of the facts——

The Court: In other words, what you are trying to say, you don't want it numbered as an exhibit of petitioners.

Mr. Shearer: I certainly do not, because I wish my objection accorded to it.

Mr. Constable: I will certainly take it, your Honor.

The Court: Well, it is immaterial to the Court.

Mr. Constable: Does the Court wish to change the marking on it.

The Court: If petitioners' counsel is correct—I wondered about it at the time, that no mention

(Testimony of M. E. Moseley.)

was made of the fact, though I made no vocal note of it. But if it is, as counsel states, not an exhibit of petitioners, it should be marked as an exhibit of respondent's.

Mr. Constable: I might say, your Honor, that it was my impression that the stipulation covering what is shown as Exhibit 8, the objections to that exhibit were much the same as the objections to all of the similar job transcripts shown in the stipulation, is that correct?

Mr. Shearer: That is correct, that we offered as part of [91] the stipulation, and not as an exhibit.

The Court: Let me see it, please.

(Document handed to the Court.)

The Court: What is the last exhibit for the respondent?

The Clerk: X.

The Court: It would be a rather strange-appearing thing for the record to have an exhibit marked in as an exhibit of the party who raised an objection, even though the objection was as to materiality and it was overruled; and since, as I understand, this exhibit is in substance comparable to those which are a part of the stipulation, and to which the petitioners' counsel did object, it would appear to me that it would be appropriate for this to be marked as respondent's exhibit because it would appear to me that the respondent is really the one that was offering it. So we will let the record show that the exhibit heretofore marked as

(Testimony of M. E. Moseley.)

8 will become Exhibit Y, unless I hear something to the contrary as to why that should not be done.

Mr. Constable: It is satisfactory.

The Court: The last exhibit, then, that we have of the petitioner is Exhibit 7, is that right?

Mr. Shearer: Yes, your Honor.

(Respondent's Exhibit Y was marked for identification and received in evidence.) [92]

The Court: All right. Now, then, let this next one be Exhibit 8, marked for identification, which is a map, as I understand, produced by this witness.

The Clerk: Yes, your Honor, Exhibit 8 for identification.

The Clerk: Identified as Petitioners' Exhibit 8.

(Petitioners' Exhibit Number 8 was marked for identification.)

Q. (By Mr. Shearer): Does Exhibit 8 contain a property which San Gabriel services under its franchise?

A. Yes, under one of its franchises and certificates.

The Court: What is Exhibit 8? Whose is it; who prepared it; what was the occasion of preparing it? What is it?

The Witness: This was prepared—this print was prepared at the request of Mr. Constable, who asked me if I would bring it to court today.

The Court: And it was prepared by whom?

The Witness: It is a copy of a tracing which is in our office that is regularly used in our business,

(Testimony of M. E. Moseley.)

and it is a direct print. It is a map drawn to a scale of 600 feet to the inch, and on it are depicted water pipe lines, pumping plants of San Gabriel Valley Water Company, tract numbers, and streets, and an indication of the political subdivision of the City of Whittier, and the San Gabriel River.

The Court: All right, go ahead. [93]

Q. (By Mr. Shearer): Are all of the tracts covered by Petitioners' Exhibits 1 through 7, inclusive, depicted on Exhibit 8 for identification?

A. Sir, I haven't seen the exhibits.

The Court: I have been wondering about that, asking this witness questions about 1 through 7, as to whether he knew what you were talking about.

Mr. Shearer: I think he misunderstands what it is, because he has seen it earlier this morning.

The Court: Maybe he has, but there isn't anything in this hearing up to now to indicate that he would be aware of what you were asking him.

Q. (By Mr. Shearer): You examined these this morning, did you not, Mr. Moseley?

A. Yes, sir. I did not take a look at the exhibit numbers that are marked on them.

I believe so. Just let me check a moment to be certain.

The Witness: May I be permitted to circle the tract number on the map as I check them?

The Court: Well, that depends on whether counsel wants it or whether it is desirable or what; I don't know.

(Testimony of M. E. Moseley.)

Mr. Shearer: Yes, it is agreeable.

Mr. Constable: I have no objection. [94]

The Court: All right.

A. The first tract number is 15062; that is Exhibit 1, and that tract is here (indicating).

The next tract is 11838. That tract is on this map.

The next one is 15741, and that is on this map.

Tract 14001 is on this map, and tract 11970 is on it, and tract 15650 is on it. So they are all on this map.

Q. (By Mr. Shearer): Is the tract referred to on respondent's Exhibit X, which I believe is tract 13977 on the map?

A. That tract is on this map. And I have circled it, as I did the others.

Q. Now, have you had any word about the freeway touching any part of the property——

I'm sorry.

Mr. Shearer: I don't know whether I offered this yet or not.

The Court: It has been marked for identification.

Mr. Shearer: I will offer it in evidence.

The Court: Any objection?

Mr. Constable: No objection.

The Court: It will be received and marked in evidence.

The Clerk: Exhibit 8 in evidence.

(Petitioners' Exhibit Number 8 was received in evidence.) [95]

(Testimony of M. E. Moseley.)

Q. (By Mr. Shearer): Directing your attention to Exhibit 8, are you aware of a proposed freeway going through any portion of Exhibit 8?

A. Yes.

Q. Of the property depicted on Exhibit 8. And do the plans for that proposed freeway touch on any of the tracts which you have marked?

A. Yes. The plans for that freeway go through tract 15650.

Q. Will that have a substantial bearing upon the occupancy factor, assuming the freeway is completed in accordance with the plans?

A. Well, the houses in the road of the freeway would be removed, no longer buy water.

Q. Approximately how many houses would be involved, if you know?

A. I don't know, sir.

Q. Now, have you brought with you the ledger sheet relating to job No. 665-W? A. Yes, sir.

Q. Is the ledger sheet entitled "Job No. 665" a similar type of ledger sheet to that of Respondent's Exhibit X, which relates to job No. 297-W?

A. Yes, sir.

Q. Does job No. 665-W, which covers tract 15377, is [96] that in the same general area as the tracts which were depicted on the map which you marked?

A. My recollection is that all of the tracts with Mr. Gersten are on this map; there are many tracts on here. I can't find it at the moment.

The Court: Are the job numbers on the map?

(Testimony of M. E. Moseley.)

The Witness: No, sir. The job numbers are directly related to the tract. The tract numbers are on the map. Here it is.

The Court: I was wondering, when I start looking at that map, I can tell that you have circled certain areas, but will I know from that which one of those contracts it relates to, or which one of those accounts it relates to.

Mr. Shearer: The exhibits have the job number and the tract number.

The Court: That is what I am asking. Is there any common identification as between the exhibits, those job numbers and the tracts as shown on the map, so that I can identify them when I look at the map?

The Witness: Each of the exhibits has the tract number to which it relates. It does not have the job number.

The Court: Does the tract number, then, appear in places where you have circled?

The Witness: It does.

The Court: The same tract number that is on the other [97] exhibit?

The Witness: Yes, sir.

The Court: All right, that is all I was asking.

The Witness: I have located 15377, if I haven't lost it again. Here it is.

Mr. Shearer: I will offer Petitioners' next in order, the ledger sheet containing job No. 665-W, and since I don't have a copy, I will ask for leave to substitute a photostatic copy, your Honor.

(Testimony of M. E. Moseley.)

The Court: Any objection?

Mr. Constable: This is Exhibit 9, is that correct?

Mr. Shearer: Yes.

The Court: It will be the next exhibit. This is the ledger sheet.

Mr. Constable: Your Honor, I question the materiality of this particular document. It is a contract made with, I believe, somebody named Crown Land Company, and it appears that the contract was made in August of 1950. I will object to it on the grounds of materiality.

The Court: The objection is overruled.

(Petitioners' Exhibit Number 9 was marked for identification and received in evidence.)

Q. (By Mr. Shearer): You stated, I believe, that these contracts had for [98] their purpose the fact that the subdivider, by these contracts, paid for the installations?

Mr. Constable: That assumes a fact not in evidence.

The Court: Let him finish the question.

Q. (By Mr. Shearer): Did you mean by that answer that that was the contractor's purpose or your purpose?

Mr. Constable: Objected to as assuming a fact not in evidence. I think that the testimony was on cross that the subdivider financed, and not paid. I think the question assumes that the subdivider is paying for installations, and the evidence is that

(Testimony of M. E. Moseley.)

the subdivider merely financed it, that is, provided the water company with financing.

Mr. Shearer: This ought to be easy to find because, as I recall, it was the first question on cross examination, and I would like the reporter to find that, because my recollection and notes indicate that the question related to it, related to the payment and the financing.

The Court: All right. I think we might as well have it found.

Reporter (Reading): "Question: Mr. Moseley, the water contracts which your company has with subdividers, wherein certain refunds or advances are provided, have for their purpose, do they not, the fact that the water companies by these contracts are then providing installations with [99] funds provided by the contractor; isn't that correct?"

The Court: You withdraw your question?

Mr. Shearer: Yes.

Q. (By Mr. Shearer): You have testified, then, that the purpose was to have the funds provided by the contractors. Whose purpose was that, Mr. Moseley?

A. That's the subdivider, the contractor's purpose, if I understand you correctly.

The Court: I think that one of the difficulties with all of this examination up to now is that there is too much of a tendency to try and inject conclusions, resulting conclusions into questions that are asked of witnesses, rather than to ask the facts.

(Testimony of M. E. Moseley.)

All right, the witness has answered the question.
Go ahead.

Mr. Shearer: No further questions.

The Court: What is that?

Mr. Shearer: No further questions.

Recross Examination

Q. (By Mr. Constable): Referring to Exhibit 9—do you have that before you? A. Yes, sir.

Q. Does that job refer to a tract of residential [100] property?

A. Principally residential property. As I recall, there is one business lot in it, and the balance is residential.

Q. You testified in connection with Exhibit 8, the tract map, concerning a freeway running through the map? A. Yes, sir.

Q. When did the plans for that freeway become final?

A. The State of California has adopted a route; plans are not final yet.

The Court: What is the implication between adopting the route as against the plans being final? What do you mean?

The Witness: I have read that statement in the paper, and it has been relayed to me by State employees that have visited me in connection with it; and I presume it is a declaration of intention as to a close approximation of a location of a freeway or highway. That's what I believe it to be.

(Testimony of M. E. Moseley.)

The Court: But you don't understand it is yet final?

The Witness: I know that the plans are not drawn at all.

The Court: I see.

Mr. Constable: That is all I have, your Honor.

The Court: I have a question or two.

Examination

Q. (By The Court): You at one point were answering a question as to factors bearing upon use of water in a subdivision. You [101] mentioned the size of the lot, vegetation, pride of ownership, as I recall? A. Yes, sir.

Q. Now, those things have to do, at least they would mean to me, factors that are outside the house. A. Yes, sir.

Q. What about the facilities and the range of facilities for use of water in a house? Do you normally regard that as being something as indicative of probable use of water?

A. We do, sir, and for this reason: The use of water all over the United States is growing constantly. We have many new devices that use water; automatic washing machines, garbage disposals use a great deal of water. But out here in California, I think our largest use is for irrigation purposes. We found ourselves in a position last year of running into the seventh month before we were out of the red.

The Court: I don't know what you mean.

(Testimony of M. E. Moseley.)

A. I mean the water company, the sales were not sufficient to cover its expenditures, its expenses for the first six months of last year. So that that is reflected by smaller sales in the winter than in the summer. And the water use inside a house is not particularly connected with the season.

Q. You wouldn't say that it doesn't have some relation to variation of seasons, would you?

A. It did, but not as much as the irrigation.

Q. Well, now, you say that irrigation is an important factor, after making the statement that the use of water through house facilities is a factor and, I judge, important throughout the United States. You don't mean by that that it is not important here, do you, like washing machines, showers, baths, dish washers, disposals, and the normal use in the house?

A. I still say that—

Q. I am just asking you, is that a substantial factor?

A. It doesn't compare with irrigation. It is substantial.

Q. All right. Now, then, have you in your experience made any study of that—and you, by reason of that experience, as manager of the water company, have some knowledge of the fact of the ratio as between the outside and the house use of water?

A. May I refer to some things I have with me that I may be able to answer that better?

Q. I don't know what you have in mind.

A. I have in mind statistical information that

(Testimony of M. E. Moseley.)

we keep for the purpose of knowing what our peak loads are and how much water we are delivering per customer and how much water is going to be required to meet a summer's load, and so we keep records of our pumping.

Q. Your water for a house and lot all goes through the same meter, doesn't it?

A. Yes, sir. [103]

Q. So those different uses you would arrive at by some other studies other than the meter reading, namely, your season — that when they were using water outside or things of that kind; is that what you are talking about?

A. When it becomes necessary to use water outside, we sell a great deal more than we do in the winter time, much more.

Q. Now, in functioning as manager of a water company, do you, as such manager, have any occasion to note a rise or fall in the areas served by you of occupancy of houses? A. Yes.

Q. That would have a very direct bearing from your month-to-month use of water, wouldn't it?

A. That would.

Q. If it was an area that was fully occupied or if it wasn't occupied? A. That's true.

Q. In the period from, say, '47 through '50, and as manager of the water company in the course of your duties, noting such things, did you note any signs of extensive unoccupancy or vacant houses in the area served by your company?

A. No, sir.

(Testimony of M. E. Moseley.)

Q. Would you say that there was comparatively full occupancy or a major portion of occupancy, or what would you say about it?

A. I would say there was a comparatively full occupancy. [104]

Q. Has that varied since?

A. That condition——

Q. Has it continued or has it changed?

A. That condition still prevails throughout Whittier, so-called Whittier area. I guess I will have to explain that.

Q. Is that the area that you were marking on the map?

A. Yes, sir. That is a portion of our Whittier district. That doesn't apply to our Fontana district.

Q. Are any of these areas that are covered by those contracts in your Fontana district?

A. No, they are not.

The Court: All right. I have asked the witness some questions. In case my questions have suggested questions counsel desire to ask, you may ask them.

Mr. Shearer: I have one question in connection with that.

Further Redirect Examination

Q. (By Mr. Shearer): You stated on examination-in-chief that the income of the occupant had a bearing on the use of water, did you not?

A. Yes, sir.

(Testimony of M. E. Moseley.)

Q. And his Honor referred to the inside use of various appliances.

In the normal course of events, will a home with two bathrooms and more appliances use more water than a home with one bathroom and less appliances? [105]

A. Yes.

Mr. Shearer: No further questions.

Further Recross Examination

Q. (By Mr. Constable): How far is Fontana from Whittier?

A. It is 35 miles.

Q. How far?

A. Thirty-five miles.

Mr. Constable: That is all.

The Court: Would there be any relationship in, say, the pride of ownership in a two-bathroom house as against a pride of ownership in a one-bathroom house?

The Witness: No, I don't think that depends on the number of bathrooms.

The Court: Do you think that would have any bearing, likewise, as to outside use of water?

The Witness: No, I guess a two-bathroom house could go on any size lot. It wouldn't have any bearing.

The Court: All right. Any more questions?

Mr. Constable: That is all.

The Court: You are excused.

(Witness excused.)

(Discussion off the record.)

Mr. Constable: May that map be left with the Court?

Is that a copy? [106]

Mr. Shearer: Yes, I prepared a copy and it may be left in evidence. I don't wish it.

Mr. Constable: I subpoenaed it. I wanted to make sure.

The Court: All right.

Mr. Shearer: Call Mr. Garnier.

CAMILLE A. GARNIER

was called as a witness by and on behalf of the petitioners, and, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name and address.

The Witness: Camille A. Garnier, 16340 Maple Grove Avenue, Puente.

Direct Examination

Q. (By Mr. Shearer): Mr. Garnier, state your occupation.

A. I am president and general manager of Suburban Water Systems.

Q. Are you also engaged in the subdivision business?

A. Oh, yes, we build 30 or 40 houses a year is all.

Q. How long have you been president and general manager of Suburban or its predecessors?

A. I have been president and general manager of Suburban Water Systems and its predecessor corporations since 1944.

Q. Is Suburban a private company similar to that of San Gabriel? [107]

A. Yes.

(Testimony of Camille A. Garnier.)

Q. You are subject to the regulatory supervision of the California Public Utilities Commission?

A. That is correct.

Q. I show you Exhibit 1 and direct your attention to the first and second paragraphs thereof. Will you examine them, please?

A. Yes.

Q. Now, are you familiar with contracts of the nature of Petitioners' Exhibit 1?

A. Yes.

Q. Have you acquired that familiarity in connection with your work for Suburban?

A. As a public utility, Suburban, San Gabriel, and practically all the rest of the public utilities in California operate under the same rules and regulations; as a result of the rules, the contracts are similar.

Q. And you are in charge of the negotiation of similar contracts with subdividers in the Los Angeles area?

A. Yes.

Q. You heard Mr. Moseley's testimony, did you?

A. Yes, sir.

Q. Is it true that you are concerned with the cost of the installation of the water pipe lines?

The Court: I think that you better develop what you want [108] this witness to testify without—I don't want to have to turn back and read the testimony of the other witness. If you want to know something from this witness about his work and his experience and how he goes about it, suppose you ask him.

Mr. Shearer: Yes, your Honor.

The Court: That is a very general question, and

(Testimony of Camille A. Garnier.)

I would have to go back and possibly read the other witness' testimony when I get down to that part of the transcript.

Q. (By Mr. Shearer): Mr. Garnier, how do you arrive at the amount which the subdivider is required to pay in connection with any water facility contract?

A. Our company requires a subdivider to deposit with it a subdivision plat map of its installation. The company's engineering department makes a layout of the water estimates required to properly serve the residential, commercial, and other types of customers that will be incidental to that development. An analysis is then made of the cost to make such an installation, and that estimate is given to the subdivider and the subdivider makes a deposit of that amount of money. Upon the receipt of the deposit by the company of the subdivider's money, the installation is made. In exchange for the deposit, the subdivider is given a refund agreement.

Q. The amount which the customer pays is the amount determined by you or Suburban to be the cost of the installation. [109] is that correct?

Mr. Constable: Your Honor, I would rather hear the witness testify.

The Court: I think he just testified to that effect.

Well, I think he has testified probably better than you are there, so——

Mr. Shearer: I was simply trying to save time in transition. I can go about it the long way.

(Testimony of Camille A. Garnier.)

The Court: All right, let's go about it in an orderly way, because this witness gave you a very clear and definite answer there. If you will just ask him the question, I am convinced that he will answer it.

I sustained the objection.

Q. (By Mr. Shearer): Is the amount of payment based solely on cost of installation?

A. Yes. The amount of payment is based upon the cost of the installation. However, the cost to the subdivider per lot will vary very widely, depending upon the location of the subdivision, in relation to the balance of the water system, the size or the frontage of the lots involved, the necessary line sizes to be paid by the water company, and in general it will result in a deposit by the developer of from \$90 to \$230 per lot, and I am taking that as an average of, oh, the last million dollars of these deposits received by our company. [110]

Q. May the nature of the soil affect the cost of the installation?

A. Soil type requiring different types of material to be used is one of the many factors involved in arriving at a cost per lot in any subdivision.

Q. Now, does the cost of the water pipe installation necessarily involve a greater use of water—strike that.

Would the fact that the cost of a water pipe installation was increased by the distance from the water company's nearest facility to the subdivision result in a greater use of water in that subdivision?

(Testimony of Camille A. Garnier.)

The Court: Now, let's have the reading of that, so that we can all listen to that.

(Question read.)

The Court: That is a very hard question to follow. I believe you can do better than that.

The Witness: I think I know what he is getting at.

The Court: I can guess at it myself, but I don't like to have to guess at it.

Q. (By Mr. Shearer): Has it been your experience that the ultimate occupants of a subdivision use more water because that subdivision was a substantial distance from your nearest facility at the time of the installation of the water mains in that subdivision?

A. The answer to your question, the cost of installing a [111] subdivision or the cost to a subdivider of making the necessary main installations to serve a particular user of water within a subdivision has little relationship to the distance of that subdivision to the company's nearest facility. However, there are about 15 factors that very considerably influence the amount of water used by the main, which in turn influences the amount of refund received by the subdivider.

Q. What factors do affect the amount of water which may be used in a subdivision during any given ten-year period from the completion of the water installation of a new subdivision until the end of that ten years?

A. The factors that are to some degree influenc-

(Testimony of Camille A. Garnier.)

ing the amount of water that will be used by a consumer in any specific subdivision are as follows:

1. The location of the subdivision and the type of land on which it is located. First, the type of soil makes a considerable difference in the amount of water used, because if it is sandy in nature, as many areas are in Southern California, the amount of water used outside of the house in the averages of the Suburban Water System, which serves areas adjacent to those about which Mr. Moseley testified, there is approximately seven to eight hundred cubic foot of an average monthly bill used within the residence, with an average for 1954 in our company of over 23,000 services of about 2,180 cubic feet used as an average for the average customer for the year, which [112] means that the difference between 800 cubic feet and 2,100 or 2,200 cubic foot is used outside of the house. So the type of soil, if it is sandy in nature, means the lawn has to be irrigated every day instead of once or twice a week, as an example.

The next factor is, if the subdivider plans lawns and shrubs at the time of the construction of the house, and that is a part of the house at the time it is purchased by the buyer, it means that the first five or six months of occupancy, there is a great deal more water used than if it is dependent upon the installation of this lawn and shrubbery by the new tenant and owner, who is busy getting installed in the house.

The next matter of temperature, for the year, the

(Testimony of Camille A. Garnier.)

amount of sunshine and the relation of rainfall. We have been normalizing our company's water use as a result of temperature, and find a difference as high as 28 percent in gross water use from a low user and a high user.

The Court: That is your margin of variation?

The Witness: Yes, sir.

The Court: Found from your study?

The Witness: From our study. We have just completed the study for rate purposes. Next, the rates of the water company are an influencing factor in water use. Where water is sold at a flat rate with no extra charge for waste, a lot of waste takes place. If the rates are low, many times the water use will be 40 to 60 percent greater than where rates are higher. [113]

The continued occupancy of the house is an important factor, and that varies as a result of people moving in and out, if they are tenants, or if they are taking prolonged vacations where the house is left vacant. Those are principally the factors that affect water use.

Q. (By Mr. Shearer): Mr. Garnier, in general, in the first year of a typical water pipe installation such as Petitioners' Exhibit No. 1—strike that.

Is the use of water during the period of construction of a home substantially less than the use after occupancy by the ultimate purchaser?

A. The use of water during the first year of the installation of a subdivision—and I am predicating this answer on one type of subdivision, which is a

(Testimony of Camille A. Garnier.)

house-building subdivision—however, a third of the subdivisions installed are not house-building subdivisions, and in some of those subdivisions the occupancy, full occupancy is not arrived at for from five to seven years, which is a very deciding and influencing factor.

One of the big factors is the speed at which the subdivider is able to construct his house, and that speed of construction will vary from four months to two years, depending upon a group of three factors. 1, availability of labor; 2, availability of material and material strikes, in which I have seen subdivisions late four weeks to two and a half months; and [114] also finance; finance because of terms of payment. The terms of payment for the house will in turn cause have wide differences in the speed of sales.

The Court: You are talking about now financing through a purchaser, individual purchaser of a house?

The Witness: Yes, sir. The type of finance, whether it be no down payment or whether it is necessary that the buyer pays a thousand or two or three thousand dollars down. In fact, I know of my own knowledge of a tract that Mr. Gersten, who is here before this Court, took him almost two years to sell all the houses in it. Therefore, the speed of sale and the speed of closing the transaction after the sale, which is the result of trying to clear up the red tape of Governmental agencies involved—I personally have had experience where the Veter-

(Testimony of Camille A. Garnier.)

ans Administration has taken six months to conclude a sale through their office after a bona fide sale was made and the down payment was received in the sales office.

The Court: Now, just a moment, because I think that you are getting beyond the question. The question was directed to different uses of water during the period of construction; at least——

The Witness: Yes, I did get beyond it. I should say during construction and to the time of the occupancy of a buyer, which from that time on there is continual occupancy and continual water use. [115]

The Court: And that is greater or less than during construction?

The Witness: During a construction period, the use of water—our company makes a charge of \$2.50 for all of the water that will be used during the entire construction period and up to the time of the occupancy of the person who is going to live in that house; and the minimum usually—I mean I am taking out of seven rates—is from \$1.75 to \$2.50 per month. Therefore, the ratio of water return or revenue, which in turn influences a refund to the subdivider, is hardly nothing during the construction period.

The Court: All right. I think that is where the question was.

The Witness: Thank you for your assistance.

Q. (By Mr. Shearer): Mr. Garnier, speaking as of the commencement of the installation of the water pipe lines, can you predict at that time how

(Testimony of Camille A. Garnier.)

much, if any, of the water pipe payments may be refunded?

A. No, sir, it is an impossibility.

Mr. Shearer: No further questions.

Cross Examination

Q. (By Mr. Constable): Have you ever personally bought one of these contracts?

A. Yes, sir. [116]

Q. How many have you bought?

Mr. Shearer: Just a moment, please. Now, the last time I ran into this difficulty—I am going to object on the ground that this is improper cross examination. I may say, for convenience, I have no objection if respondent wishes to offer this as his evidence, so that I may——

The Court: You are objecting on the grounds that this is improper cross?

Mr. Shearer: Yes.

The Court: The objection is overruled.

If it later develops that it appears that it is, you may object again, but it isn't up to this point.

You may proceed.

Q. (By Mr. Constable): Are you familiar with the area shown on Exhibit 8?

A. Could I see Exhibit 8?

Yes, sir.

Q. This is generally sandy soil, is it not?

A. Well, I would say more loamy, sandy, loamy soil. It isn't as sandy as some of the other areas.

(Testimony of Camille A. Garnier.)

Some areas of it is heavy soil, in fact, in the north part.

Q. It is true, isn't it, that in 1949, 1950, there is, as affecting your company, a dollar and twenty-five cents minimum payment by water users to be made to your company for the use of water? [117]

A. No, sir, not of my knowledge.

Q. Are you familiar with the PUC regulations with regard to minimum payments?

A. Very familiar.

Q. Does that vary from company to company?

A. Yes, sir, it varies within companies. That is another large factor in determining a refund, because of the rate schedules within a company. We have seven different rate schedules going from \$1.75 to \$7.00 as a minimum to a customer within our company.

Q. Referring to the area shown on Exhibit 8, would you say——

The Court: Let him see it.

The Witness: Isn't that the one you just showed me?

Mr. Constable: Yes, that is the map.

Q. (By Mr. Constable): Referring, Mr. Garnier, to the area shown on Exhibit 8——

A. Are you speaking of the area within the boundaries of the San Gabriel Water Company?

Q. That is correct. A. All right.

Q. It is true, isn't it, that a minimum rate of \$1.25 would be exceeded by most of the home users

(Testimony of Camille A. Garnier.)

in the tracts shown as 15650 and other tracts circled in pencil? [118]

A. I am sorry, but I don't believe I could answer the question, for the reason that it would take an analysis of the rate structure and the rate and the use of water by the average customer in that area, and I do not have those figures or have never examined them.

Q. I think you testified that you could not predict the amount of refunds to be obtained on a water deposit contract?

A. Yes, sir. It is very difficult to predict it with any certainty.

Q. But it can be predicted?

A. Yes, within bounds, yes, sir.

Q. And on the basis of that prediction, you bought some contracts?

A. I bought a contract.

Q. A contract? A. Yes, sir.

Mr. Constable: That is all, your Honor.

Redirect Examination

Q. (By Mr. Shearer): Did you buy that contract personally? A. Yes, sir.

Q. Was the subdivision to which it related fully completed when you bought it?

A. Well, the houses had been installed and fully occupied for a period of about four years. [119]

Q. Where was this property?

A. West Covina.

Q. How much did you pay for that contract?

(Testimony of Camille A. Garnier.)

A. I think we paid about \$8,400 for a \$6,800 contract.

Mr. Shearer: No further questions.

Recross Examination

Q. (By Mr. Constable): Mr. Garnier, you have purchased contracts or a contract, you say, personally; then you said "we." Now, whom were you referring to?

A. Could you repeat the question?

(Question read.)

A. Well, I am speaking for my sister and myself, who is in business with me.

Q. Now, Mr. Garnier, in addition to purchasing some of these contracts personally, you have, have you not, through companies in which you have a financial interest purchased some of these similar contracts?

Mr. Shearer: Again I am going to object on the ground that this is improper cross examination.

The Court: The objection is overruled.

The Witness: Would you repeat the question?

(Question read.)

A. Yes.

Mr. Constable: That is all, your Honor. [120]

Mr. Shearer: I would like to examine further on the new matter raised by counsel.

The Court: Well, I don't know whether there is any new matter that has been raised, but if you have some questions, you may ask because he is your witness.

(Testimony of Camille A. Garnier.)

Further Redirect Examination

Q. (By Mr. Shearer): What companies purchased these contracts?

A. Well, it is a little difficult to answer that question so that it would be properly interpreted. It would be necessary for me to make a statement prior to that, if that is agreeable, because the purchase of the contract within our company, which has been very limited, is for a purpose—not a basis—utterly different than was ever available to Mr. Gersten.

Mr. Constable: I object. I move that this be stricken.

The Court: Well, I think if you can answer the question, then if there is any explanation called for, why, it may be asked.

Let's get back to the question.

(Question read.)

The Court: Let the record show that he is asking what company.

A. I think Garnier Construction Company purchased a contract. [121]

Q. That is in addition to the contract to which you referred when you spoke of a purchase by yourself and your sister? A. That is correct.

Q. Now, when did Garnier Construction Company purchase this contract?

A. I wouldn't know. It would be in the last two years probably.

Mr. Shearer: No further questions.

(Testimony of Camille A. Garnier.)

Further Recross Examination

Q. (By Mr. Constable): You know the company named California-Pacific Finance, do you not?

A. Yes, sir.

Q. You also know a Mr. Brittain?

A. Harry Brittain?

Q. Yes.

A. What is his address? I know two or three Brittains. That's the reason I ask.

Q. Harry L. Brittain.

A. What location?

Q. Gunn and Telegraph.

A. Yes, sir, I know the gentleman.

Q. Yes. Now, isn't it true that you encouraged in this deal, in a deal with these two parties——

A. Two parties? Which is the other party?

Q. California-Pacific Finance, whereby you, in effect, traded preferred stock of your company for the builder's contract?

Mr. Shearer: May I ask the purpose for which this question is directed? Otherwise, I object to it on the ground of its immateriality.

The Court: Well, I assume it is a part of the cross, which is directed, as the other was, to testing the soundness of the first categorical answer, that you couldn't estimate that there would be any refund.

Mr. Shearer: Your Honor, that question related to a specific kind and specific time, and the fact that many years later—several years later this witness may or may not have been involved or not in-

(Testimony of Camille A. Garnier.)

involved in the purchase, I submit, is neither proper cross examination nor material to the issues here involved.

The Court: The objection is overruled.

Read the question.

(Question read.)

The Court: The question about being able to determine the refunds, so to speak, on the basis of water use—your question was not based on any particular time or as of a particular time. It was a general question. So for that reason, among others, this is proper cross and—may not develop [123] to where it amounts to anything, I don't know about that, but we will see, and if it does or it doesn't, the Court will determine it when it starts considering the evidence and finding the facts.

The Witness: Would it be fair to ask for a restatement of that question?

What do you mean by "your company," which company?

Q. (By Mr. Shearer): Suburban Water.

A. Could you reframe the question, please?

Q. What you did, did you not, Mr. Garnier, was to take preferred stock of your company—

A. Could you state the company names because—

Q. Suburban Water Company, and give the builder who held the right to refunds, preferred stock in trade for the contract of refunds which he held?

A. If my memory is correct, I believe that such

(Testimony of Camille A. Garnier.)

an exchange on a dollar for dollar basis was made with Mr. Brittain, yes, sir.

Mr. Constable: That is all I have.

Mr. Shearer: What is the name?

Mr. Constable: Brittain.

The Witness: I might explain further that this is unique to Suburban Water Systems and is not done by any other company that I know in California. [124]

Q. (By Mr. Shearer): When was this done?

A. Within the last 12 or 16 months.

Q. Prior to that time had there been any like transactions by Suburban Water Company prior to the first exchange of this preferred stock?

A. Yes, sir.

Q. When was the first time that Suburban ever made such an exchange?

A. If I remember correctly, again, the Public Utilities Commission approved the exchange of Suburban Water System securities on a dollar for dollar basis for the outstanding value of a refund agreement in February of 1952. That is the first instance I know of in California.

Q. Now, this Brittain transaction, did it involve a subdivision with which you were familiar?

A. Yes, sir.

Q. Did you appraise the specific factors there involved?

A. Yes, sir. I made many such appraisals.

Q. By the way, what does your preferred stock pay?

(Testimony of Camille A. Garnier.)

A. This is a 3 percent cumulative preferred.

Q. Is it readily marketable?

A. No, it is not.

Q. Is it redeemable at the option of the holder thereof?

A. It is redeemable at the option of the water company. [125] The holder might be the owner.

You mean the owner?

Q. The owner, yes.

A. No, sir. There is no redemption provision, no sinking provisions.

Q. Do you know whether this stock is quoted on any exchange or over the counter?

A. No, sir. What sales are made are made at very considerable discount.

Mr. Shearer: No further questions.

Mr. Constable: That is all, your Honor.

The Court: I have some questions.

Examination

Q. (By the Court): What is your position with the Suburban?

A. I am president and general manager.

Q. How long have you been president and general manager?

A. Since 1944.

Q. '44?

A. Yes, sir.

Q. Do you have to do with or know of the contracts such as these 1 to 7, Exhibits 1 to 7 show, in this proceeding, the contracts that are of that nature that your company makes?

(Testimony of Camille A. Garnier.)

A. Yes, we have about two million dollars worth outstanding at the present time. [126]

Q. Do you know of any of them that have run for any appreciable percentage of the ten-year period, where there have been no refunds?

A. Yes, sir.

Q. Very many?

A. In answer to that, I have just finished a study of that question for our own office about five months ago, and the results of the study indicated that we have contracts that would pay on the ten-year period, $6\frac{1}{2}$ percent of the face value up to the full payment of the total contract in six years; I mean there is that much variation.

Q. What sort of areas are there where there have been no refunds?

A. There are areas right alongside of each other. It depends on the type of development.

Q. What are the variations?

A. You could have a subdivision—I will give two examples; an example of maximum return and one of minimum. A subdivision wherein there was one street laid with a pipe line going up the center of that street serving houses on both sides, with a cost of approximately \$85 per lot, an average rate of \$45 to \$48 a year.

Q. What do those figures refer to? I don't know what you are meaning by those.

A. Where the cost to the subdivider was \$85 per lot [127] for the installation of water mains, and where the consumer paid additionally \$45 to \$48 for

(Testimony of Camille A. Garnier.)

water service on a 35 percent refund, it meant that that tract paid out in six to seven years.

Now, right alongside of it was a subdivision where, because of the way it was laid out, where it was necessary to lay pipe lines all around the periphery of the tract with lots only on one side of the pipe line, doubling the cost, and where the cost of that tract ran about \$180 to \$190 a lot, and lots were sold and some houses were built. There were many of those lots at the end of the sixth year, even though the subdivider had sold the lot and received his money therefor, the purchaser had not yet built a residence thereon, and there was no money coming back from it, coming back to the subdivider. And in those instances those tracts paid 20 to 25 percent of the full amount of the deposit. The tract that went——

Q. In other words, where that exists, your experience would be that—your study—they had gotten back in the period 25 percent?

A. Of the full deposit by the end of the tenth year.

Q. All right. Now, contrast that situation with one that is fully built and sales are what might be regarded as normal, namely, the sales of the houses to purchasers.

A. In the case of a subdivider that is going to build the houses at the same time that the mains are installed, the amount of money that would be returned of the total deposit [128] would depend a great deal on the time that that installation was

(Testimony of Camille A. Garnier.)

made, and as an average—again I am speaking as an average over let's say 10,000 services have been installed by our company in the last two or three years, which may not be applicable to this case, which was way prior, and where costs were different and everything else—the refund will be anywhere from 65 percent to about 105, with an average of about 70 to 80, approximately very close with what Mr. Moseley said.

Q. How do you get a refund of 105 percent?

A. Well, because the contract will pay out in full by about eight and a half years.

Q. It doesn't run the full ten-year period?

A. That's correct.

Q. And you are allowing a figure in there to make up for that accelerated repayment?

A. It probably isn't the correct way to state it.

Q. I think that we understand what you mean.

So that in these matters and in making a calculation as to how they are going to pay out, you take into consideration the tract, whether it is built up rapidly and the houses are sold, or whether it is a hit or miss proposition?

A. That is correct.

Q. And those are the extremes probably?

A. That is correct.

Q. And where you have those facts and you know the area, [129] then is it true that you are unable to make some fairly satisfactory calculations as to what will be returned?

(Testimony of Camille A. Garnier.)

A. Yes, your Honor, up until the time that the tract has been fully occupied for about a year and a half to two years, because that eliminates a lot of the factors that should come about, but if everything went right—but that you just can't tell.

Q. Well, does the nature of the area, the demand for homes, the rate at which homes are selling, and factors of that kind, have some enlightening effect on your being able to make such a computation?

A. Yes, sir, they are a big factor in making the computation.

Q. In short, if no house has been built on a subdivision when you complete your mains, but it is in an area that is growing, and houses around on other tracts are selling regularly and there is a demand for them, that would be quite different, wouldn't it, from one that was out somewhere else, and it was an untested area and you couldn't tell what the demand was going to be?

A. Not quite, sir, because within three blocks of our office there are three subdivisions covering about 180 acres that were subdivided seven years ago, and there are still approximately 30 percent of the lots vacant. And yet immediately surrounding them there are other tracts that are selling [130] houses ahead of their construction.

Q. Is there a difference in the contour or the construction or the arrangements and plans of sale as between those areas?

A. Yes, sir, and the type of development that is within the areas.

(Testimony of Camille A. Garnier.)

Q. So those, likewise, are factors that you take into account in computing——

A. Yes, sir, it would be necessary.

There are two things we are talking about. One is the amount of refund and the other is the value of the agreement. The amount of refund is affected by these many factors——

Q. I think that one of your difficulties here—you have been very enlightening—but I think one of your difficulties is that you are trying to answer some of the questions that are involved in this case, rather than questions that relate to this housing and the installation of water and the use of water.

I rather conclude that you have some knowledge of the question that is at issue here on the tax standpoint and that you are letting that creep into your consideration and phrasing of your answers, whereas the Court here is interested in strictly the operation of your water company and these factors that have nothing to do with the tax except by way of result, and how they are dealt with and treated in your making of these contracts and in the making of the refunds to the water users or [131] to the owners of the contracts, whoever it is.

The Court: All right. any questions that counsel may have had suggested by my questioning, you may ask.

Mr. Shearer: No further questions.

Mr. Constable: No questions.

The Court: You are excused.

(Witness excused.)

Mr. Shearer: I will call Mr. Gersten.

ALBERT GERSTEN

was called as a witness by and on behalf of the petitioners, and, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Albert Gertsen.

Direct Examination

Q. (By Mr. Shearer): Mr. Gersten, state your occupation, please.

A. Subdivider and builder.

Q. How long have you been in the subdivision business? A. About 16 years.

Q. How have you operated with respect to entities?

A. Partnerships, joint ventures, corporations, sole ownerships.

Q. Where has your primary business been conducted? A. Los Angeles County. [132]

Q. You are familiar with what has been called the water facilities contracts, Exhibits 1 to 7?

A. Yes.

Q. You have seen those before? A. Yes.

Q. Apart from the practical need of water which may or may not exist, is there any legal requirement in Los Angeles County to bring water to a subdivision tract?

A. Yes, legal in this way: Unless you bring water in and have it available for each lot, the California Real Estate Commissioner will not issue a permit to sell property.

(Testimony of Albert Gersten.)

Q. Now, Mr. Gersten, have you subdivided properties in areas served by municipally owned water systems? A. Yes.

Q. In those cases do you, a subdivider, pay for the water pipe installations?

A. Yes, in all cases the subdivider must pay in order to have a salable subdivision. That's the first requirement.

Q. In those cases are there any rights to receive refunds contingently or otherwise?

A. No, there are not. In areas specifically which I have a direct knowledge, in the City of Los Angeles, there is no refund of any kind. In the City of Alhambra, where I subdivided, there are no refunds; and so on. There are several others in which there are no refunds, but I was compelled to [133] pay the cost of installations.

Q. Mr. Gersten, directing your attention to the J. Richard Company, what position did you occupy in that company? A. President.

Q. You were familiar with its affairs and its business? A. Yes.

Q. And what position did you occupy in the Lawrence Land Company? A. President.

Q. Were you familiar with its affairs and business? A. Yes.

Q. Both of those corporations were subdividers?

A. Yes, in the subdivision and building business.

Q. In what respect, if any, was the operation of J. Richard Company different from that of Lawrence Land Company?

(Testimony of Albert Gersten.)

A. Different in location of land, different in value of land, both raw and finished, different in the types of houses constructed, different in type of financing obtained, different in the type of sales program, different character of buyers.

The Court: Were they both residential developments?

The Witness: Yes, sir.

Q. (By Mr. Shearer): It has been stipulated that the Lawrence Land Company was incorporated on May 20, 1949 and commenced doing business shortly after that time. On or about May 20, 1949 did the [134] J. Richard Company have any obligations?

A. I don't know at that particular date if J. Richard Company started construction of houses; had a very, very large liability.

Q. Did the J. Richard Company have an obligation with respect to each home it constructed prior to the time it sold that home? A. Yes.

The Court: What do you mean by that?

Mr. Shearer: Had an obligation?

The Court: Yes. I think you better follow that up.

What do you mean by that, Mr. Witness?

The Witness: In our interim financing, we executed notes secured by deeds of trust on each piece of property for an amount given to us, agreed to give us by the lending institution.

In this particular J. Richard Company tract, as I recall now, the obligation or the lien on these

(Testimony of Albert Gersten.)

houses was approximately two million dollars, and those were liabilities of the company and myself until the houses were sold and the new buyer assumed the liability.

The Court: That is a rather normal operation, isn't it?

The Witness: Well, I don't know. There are many, many phases of it. Some builders don't borrow money. They are fortunate to have the expenses to carry themselves.

The Court: But not too many of them. [135]

The Witness: Well, not too many rich people, I suppose.

The Court: I mean, something that is more often than not. I was just a little bit puzzled at the question, but go ahead. Maybe it will clear up for me.

Mr. Shearer: Yes, your Honor.

Q. (By Mr. Shearer): Did the Lawrence Land operation involve Federal Housing Administration commitments?

A. Yes, all of my developments did.

Q. So did the J. Richard Company?

A. Yes, sir.

Q. Did the existence of the obligations outstanding of the J. Richard Company have a bearing upon the obtaining of additional Federal Housing Administration commitments at that time?

The Court: By whom?

Mr. Shearer: I was just about to say by the J. Richard Company.

A. Yes. J. Richard Company could not obtain

(Testimony of Albert Gersten.)

any additional FHA-insured builders' loans because of its rather contingent liability, and for a practical purpose, in our business — and which is general practice, that each subdivision stands on its own. They rarely, in my experience, have any continuing subdivisions, one onto the other, because of the large contingent liability existing during construction period. [136] And in order to obtain FHA firm commitments, in this case on J. Richard Company, the paid-in capital would have had to be so large that very few people I know could meet it, with the result a new subdivision — had a new corporation known as Lawrence Land Company, which at its inception was free to obtain necessary financing and commitments through FHA, based on a certain capitalization.

Q. Now, directing your attention to the water facilities contract again, was there a variation in the time, commencing with the commencement of the water pipe installations and ending with the completion of the houses, completion and sale of the houses in a given tract, as between one subdivision and another? A. Yes.

Q. What factors would create such variations?

A. Well, in our specific cases——

Q. I am directing my attention, I should say, to the period from June 1947 through December 1950.

A. There were shortages, labor shortages, one trade would have to wait upon another; as an example, in the course of subdividing, first is grading; next, sewer installation; next, water. If either of

(Testimony of Albert Gersten.)

the contractors prior to the sewer installers does not have his work done—that is, prior to the water installers—does not have his work done, in that case the water company must wait, of necessity, until these other [137] two things are done.

The time element varies with these conditions, over which no one has control. They may vary four months, six months, three months, I don't know. But there is a different variance.

The Court: Now, you are speaking generally?

The Witness: In our particular subdivision, my personal experience.

Q. (By Mr. Shearer): Is that statement also applicable in general to subdivisions in Los Angeles County, if you know? A. Yes, I think so.

Q. Would such things as strikes be a factor?

A. Yes.

Q. Would material shortages be a factor?

A. Yes.

The Court: Those things, of course, follow as a matter of course, that they would be a factor in completion of construction. I think you could almost say as a matter of reason and logic that that would be true.

Mr. Shearer: Yes, your Honor, I think so too, but I can't be so sure that your Honor thinks so until your Honor says so.

The Court: Well, but I don't know whether that still has to do with this case or not, other than just a generalized statement. Of course, if they happened, why—— [138]

(Testimony of Albert Gersten.)

Mr. Shearer: I think the point is, not whether they happen, but the fact if they happen from time to time, and their inability to predict. That is what I am concerned about here, is the difficulties of prediction. I tried to bring that out.

The Court: We are concerned here with the difficulties of prediction with respect to these particular tracts. We don't have any other tracts involved here; we have these tracts. That is where these water contracts are related to. There are seven of them here.

Mr. Shearer: I think there are six — seven exhibits.

The Court: Six tracts, that is right.

Mr. Shearer: Yes.

The Court: You can have all sorts of generalized statements. If it didn't happen to these, then, that would present a different situation.

Mr. Shearer: Well, I will reserve that——

The Court: That is one of the troubles. We are getting a lot of generalized discussion here, where, as a matter of fact, we are dealing with specific property and the contracts relating to them.

Mr. Shearer: I think that is a matter that I will have to take up on brief.

The Court: I rather assume so.

Mr. Shearer: I don't entirely agree with your Honor, but [139] I have had the advantage of carefully going over the stipulation, and for that reason——

The Court: Of course, I don't know — if those

(Testimony of Albert Gersten.)

things are covered in the stipulation with respect to these particular tracts, why, then, that would take care of that.

Q. (By Mr. Shearer): Mr. Gersten, during the period from June 10, 1947 through December 1950, were there any strikes affecting the building industry? A. Yes, definitely.

Q. Now, were those strikes predicted prior to the time they happened? A. No.

Q. Now, did the outbreak of the Korean situation in 1950 have a bearing upon availability of materials? A. Very definitely.

Q. In what respect?

A. Shortages resulted in slowups, that certain crafts—steel, for instance, couldn't be delivered to a job; cement was in short supply, with the result that trades had to wait a longer period of time to make its installations, and specifically has affected these tracts in this matter, in this case. We had a painters' strike that resulted in a delay in Lawrence Land Company, a delay in completing that tract about four months. We had a strike in J. Richard Company—a general [140] strike was called on one of our tracts—I think it was 15062—that delayed the construction. And in that case we required a lengthy court proceeding against the union.

Q. Referring to the strike affecting the J. Richard Company, did that strike break out after the water pipe line contract had been started?

A. Yes.

(Testimony of Albert Gersten.)

Q. In referring to the strike affecting Lawrence Land Company, did that strike break out after the water pipe installations had commenced?

A. Yes, quite a time after that.

Mr. Shearer: No further questions.

Cross Examination

Q. (By Mr. Constable): I think you mentioned that the Korean war broke out in 1950. That was June, around June 25, 1950, wasn't it?

A. I should remember, but I presume that was it.

Q. Yes, and you also testified that there was a slowup in your building, caused by a shortage of materials and all of the other factors which result from a wartime economy, is that correct?

A. That there were shortages?

Q. Yes, and a consequent slowup in building, in general?

A. Yes.

Q. Home building? [141]

A. Yes.

Q. Now, as a result of that, it is also true, isn't it, Mr. Gersten, immediately that the Korean war broke out and that building shortages were anticipated, owning homes became in demand?

A. Homes became in demand, but the ability to construct them and deliver them was still the same. I mean our sales at times were ahead of our production, but because of these slowups we could not deliver the house, and it resulted in many cancellations.

(Testimony of Albert Gersten.)

Q. I see. And these slowups occurred, then, after the outbreak of the Korean war?

A. They occurred generally from 1947 through 1950, '51.

Q. The Korean war slowups?

A. No, the shortages. Shortages were created by the—at the closing of the war, and when building got an O.K. there were shortages constantly, and delays.

Mr. Constable: That is all I have, sir.

The Court: You are excused.

(Witness excused.)

Mr. Shearer: Subject to the proposed stipulation that I offered respecting the item that came up regarding Mr. Moseley's testimony, petitioner rests.

Mr. Constable: I have no witnesses, your Honor, but I didn't quite understand the last statement Mr. Shearer made. [142]

Mr. Shearer: I offered a stipulation to which counsel agreed to consult, and subject to being able to stipulate or asking permission to cover it by evidence if we are unable to stipulate——

The Court: I see no reason why it can't be stipulated, and of course if the parties draw up a stipulation covering the facts they can file it.

Mr. Shearer: I see no reason why it can't be stipulated either. I don't know what the facts are, but I assume the water company does.

The Court: Well, they ought to. They have a record of their contracts down there. It would be a strangely operated company if they didn't.

Mr. Shearer: I don't think there is any question that they do.

Mr. Constable: I think respondent has stated its position in that connection.

The Court: All right.

Mr. Constable: I am going to withdraw some exhibits.

The Court: Do you have anything to offer?

Mr. Constable: No.

The Court: You say you have no witnesses. Do you have any other evidence?

Mr. Constable: Nothing.

The Court: All right. You both rest, then, I take it, [143] subject to the fact that you are going to get together on a stipulation with respect to those items from the water company books?

Mr. Shearer: Yes, your Honor.

The Court: Now, this is going to be a bad case to work. There are main issues running with one group, main issues running with another group of these proceedings, and then there are side issues that relate to individual proceedings, and I don't know how much of your stipulation is a stipulation of evidence and how much is a stipulation of facts. We have gotten into the habit of referring to stipulations as being stipulations of fact, even though very often they are stipulations of evidence, and not true stipulations of fact.

Since it is an involved matter, I want you gentlemen to do me a very good job, a very careful job on proposed findings, because even in the most difficult cases, insofar as the law is concerned, and much

more often than not, your case is decided when the facts are found and you don't have—when the facts are found definitely and clearly, you don't have nearly so much trouble with the application of the law. Sometimes you don't have any. So I want you to take whatever time is needed for doing a good job.

I am going to be just as much interested in the job on your proposed findings as I am in this very deep discourse on the law that I anticipate coming with the questions here involved. [144] And I would like for you to take that stipulation of facts, and to the extent that it is a stipulation of evidence, namely, an agreement of evidence that is to go in or evidence that has come in by agreement, and from that evidence find the facts just the same as you think they ought to be found, propose the facts that you think ought to be found from that, just the same as you propose the facts that you think should be found from the oral testimony, so that I will have a completed job, and not have to wade through documentary stuff and sort out and make findings myself.

Now, how much time do you think you will need to do your job?

Mr. Constable: May I ask what kind of briefs the Court will order?

The Court: Well, I normally prefer the first brief by the party who is the moving party, and usually that is the petitioner in the proceedings before us, but I have found that I don't get as good briefs from the respondent that way as I do having

simultaneous briefs and then replies. So I have, over the last year or two, gradually been abandoning my former practice of having the moving party file a brief and then the other party respond or reply.

If I could be assured of getting good answering briefs that way, I might continue it, but unless I have some reason, otherwise I am going to have to ask for simultaneous briefs with [145] reply.

Mr. Constable: Mr. Shearer and I have talked about this during the stipulation of fact, and we arrived at a few points, at which time I informed him, because of that, I would like seriatim briefs.

The Court: The difficulty with that is, I never get a reply out of the respondent.

Mr. Constable: I might say, your Honor, I would like seriatim briefs on the arguments of the joint return, on the excess profits tax, and a simultaneous brief on the facts, so I think simultaneous briefs would be satisfactory to the respondent.

The Court: Well, I am going to set it that way. How much time do you think you will need?

I may say that I am very heavily loaded with submitted cases, and you might just as well ask for as much time as you need now and not have to file a motion for extension of time.

Mr. Constable: I had a case this morning in which I was given 90 days. This case, then, I suppose—

The Court: That case this morning was a simple case compared to this one.

Mr. Constable: That is correct, your Honor.

I think it could be set about the same time, as far as I am concerned.

Mr. Shearer: I am inclined to think a little longer time than that. [146]

The Court: 120 days?

Mr. Shearer: 120 days, partly because I have cases coming up on the next two calendars that will take up a considerable part of my time.

The Court: Very well, 120 days, with 45 for reply. And I want good reply briefs from both of you.

The case stands submitted upon the filing of briefs.

Mr. Constable: Your Honor, would the Clerk prefer that I withdraw these exhibits off the record or in the record?

The Clerk: Either way.

Mr. Constable: I can tell you what they are.

The Court: Well, you make your arrangements with the Clerk. The withdrawal of returns and exhibits that are readily susceptible of having photostats substituted is a matter of usual practice here, and unless there is some reason or otherwise, you make your arrangements so that the record is preserved, the integrity of the record is maintained, and that is all that is necessary. There should be no difficulty.

So you make your arrangements with the Clerk, and unless there is something further, then, that concludes the business until we call the Palmer case at 10:00 o'clock on Monday morning, as I understand it.

The Clerk: That is correct.

Mr. Shearer: There may be some difficulty, your Honor, in obtaining the information requested of the water company, and I [147] assume we can simply mail that stipulation on.

The Court: What is done rather regularly in Division 8—and I happen to be Division 8—is that where there is a matter that indicates by its very character that it is readily susceptible of stipulation, the parties regularly work it up. If they can get it done before I leave, that is very good. If they don't, they merely attach a motion and send it in, say "Herewith is a stipulated matter," and that thereby becomes a part of the record, because I grant it. I have never had any difficulty. It always works nicely, and I don't think you should have any difficulty on that here.

If you get it finished before I leave, fine; if you don't, fix it up and send it in.

If there is nothing further, then,——

The Clerk: The respondent has withdrawn all of his exhibits from A through Y, and Petitioners' Exhibit No. 8. The respondent has these exhibits and will forward them to Washington.

The Court: We will stand adjourned.

(Whereupon, at 5:55 o'clock p.m., the hearing in the above-entitled petition was closed.)

[Endorsed]: T.C.U.S. Filed May 17, 1955.

[Title of Tax Court and Docket No. 51226.]

DESIGNATION OF CONTENTS OF
RECORD ON REVIEW

To The Clerk of The Tax Court of the United States:

You will please prepare, transmit, and deliver to the Clerk of the United States Court of Appeals for the Ninth Circuit copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review heretofore filed by the Taxpayer:

(1) The docket entries of all proceedings before the Tax Court.

(2) Pleadings before the Tax Court, as follows:

(a) Petition.

(b) Answer.

(3) The findings of fact and opinion of the Tax Court.

(4) The decision of the Tax Court.

(5) The petition for review.

(6) Written stipulation of facts entered into by petitioner and respondent, exclusive of the following paragraphs: 9, 10, 11, 12, 21, 22, 23, 24, 31, 32, 33, 34, 35, 42, 43, 44, 45, 48, 49, 50, 51, 52, and 74.

(7) Supplemental Stipulation of Facts.

(8) All Exhibits other than Respondent's Exhibits A through P, both exclusive.

(9) The entire official transcript of oral testimony including statements and stipulations of counsel and of the trial Judge.

(10) This designation of contents of record on review.

/s/ JACOB SHEARER,
Attorney for Petitioner.

Of Counsel:

TANNENBAUM, STEINBERG &
SHEARER.

Affidavit of Service by Mail Attached.

[Endorsed]: T.C.U.S. Filed Feb. 5, 1958.

[Note: Designation of Contents of Record on Review in Docket Nos. 51228 and 51229, filed Feb. 6, 1958, are the same as Docket No. 51226, set out at pages 256-7.]

[Title of Tax Court and Docket Nos. 51226, 51228, 51229.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 24, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designation of Contents of Record on Review" and "Designation of Additional Portions of Record on Review" excepting exhibits, which are separately certified, on file in my office as the original and complete record in the cases before the Tax Court of the United States docketed at the above numbers and in which the petitioners in the Tax Court have filed petitions for review, as above numbered and entitled, together with a true

copy of the docket entries in said Tax Court cases as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 26th day of February, 1958.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the
United States.

[Endorsed]: No. 15945. United States Court of Appeals for the Ninth Circuit. Albert Gersten, Myron P. Beck and Ann H. Beck, Milton Gersten and Mary Gersten, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Petitions to Review Decisions of The Tax Court of the United States.

Filed: March 17, 1958.

Docketed: March 21, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 15945

ALBERT GERSTEN, MYRON P. BECK, and
ANN H. BECK, MILTON GERSTEN and
MARY GERSTEN, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS

Albert Gersten, Myron P. Beck and Ann H. Beck, and Milton Gersten and Mary Gersten, the Petitioners herein, by their attorney, Jacob Shearer, hereby assert the following errors, which they intend to urge on review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States in the above causes, Tax Court Docket Numbers, 51226, 51228 and 51229, on October 30, 1957.

1. Rights under certain contracts were assigned and distributed to petitioners upon the dissolution and liquidation of certain corporations of which they were stockholders. Said rights consisted of the right to receive monies upon the happening of and measured by certain contingent future events provided for in the contracts, similar to the rights under the contracts in issue in the case of *Westover v. Smith*, 173 F. 2d 90 (C.C.A. 9, 1949). The Tax Court erred in determining that such rights had ascertainable fair market values for the

purpose of determining petitioners' capital gains on the dates of the distributions in final liquidation, respectively, by said corporations.

2. During the year 1950, petitioner Albert Gersten married Bernice Ann Gersten in Mexico, immediately following a divorce decree, which he obtained in Mexico, dissolving his marriage to Lucille Gersten. Under California law, Albert Gersten was estopped from obtaining and could not have obtained an annulment of the marriage to Bernice Ann Gersten and was estopped from asserting, for property and status purposes, that he was not married to Bernice Ann Gersten. The Tax Court erred in determining that Respondent was a proper person entitled to challenge the validity or existence of the marriage and further in determining that petitioner Albert Gersten and Bernice Ann Gersten were not entitled to file a joint return as husband and wife, pursuant to Section 51(b) of the Internal Revenue Code of 1939.

Dated at Beverly Hills, California, this 20th day of March, 1958.

/s/ JACOB SHEARER,
Attorney for Petitioners.

Of Counsel:

TANNEBAUM, STEINBERG &
SHEARER.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 21, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS
OF RECORD

Albert Gersten, Myron P. Beck and Ann H. Beck, Milton Gersten and Mary Gersten, the respective petitioners herein, by their attorney, Jacob Shearer, hereby adopt, as their designation of the record in the above entitled causes, the "Designation of Contents of Record on Review" respectively filed by them with the Clerk of the Tax Court of the United States in Tax Court Docket Nos. 51226, 51228 and 51229 respectively, and copies of which were duly served upon counsel for Respondent. Said Designations have been certified and transmitted by the Clerk of said Tax Court to the Clerk of the above entitled Court.

Dated at Beverly Hills, California, this 20th day of March, 1958.

/s/ JACOB SHEARER,
Attorney for Petitioners.

Of Counsel:

TANNENBAUM, STEINBERG &
SHEARER.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 21, 1958. Paul P. O'Brien, Clerk.



No. 15945

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT GERSTEN, MYRON P. BECK and ANN H. BECK,
MILTON GERSTEN and MARY GERSTEN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF OF PETITIONERS.

JACOB SHEARER,

Attorney for Petitioners.

Of Counsel:

TANNENBAUM, STEINBERG & SHEARER,

Suite 300, 151 El Camino Drive,
Beverly Hills, California.

FILE

JUN 10 1958

PAUL P. O'BRIEN,



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No. 15945
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ALBERT GERSTEN, MYRON P. BECK and ANN H. BECK,
MILTON GERSTEN and MARY GERSTEN,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF OF PETITIONERS.

JURISDICTION.

These are appeals from three judgments of the Tax Court of the United States, each entered October 31, 1957. Said judgments were entered in separate proceedings which were consolidated for trial and hearing.

Within ninety days after August 24, 1953, the date of the mailing by the Commissioner of Internal Revenue of separate notices of deficiencies to petitioner, Albert Gersten, to petitioners Myron P. Beck and Ann H. Beck, and to petitioners Milton Gersten and Mary Gersten, respectively, in the petitioners' income taxes, each of the petitioners filed their petitions for redetermination of the respective deficiencies pursuant to Section 272(a) of the Internal Revenue Code of 1939 [R. p. 3]. The Tax Court of the United States has jurisdiction of such actions

under the provisions of Sections 1101 and 272 of the Internal Revenue Code of 1939.

As set forth in the separate petitions for review [R. pp. 98, 100, 102] each of the petitioners are residents of Los Angeles County in the State of California [R. pp. 99, 101, and 103]. Each of the petitioners filed their respective income tax returns for the taxable year 1950 with the District Director of Internal Revenue for the Sixth District of California whose office is located within the Ninth Judicial District wherein each of the petitioners also reside [R. pp. 99, 101, 103]. The United States Court of Appeals for the Ninth Circuit has jurisdiction to review the decision of the Tax Court under the provisions of Section 1141 of the Internal Revenue Code of 1939 and Section 7482 of the Internal Revenue Code of 1954.

STATEMENT OF THE CASE.

ISSUE I.

The Ability or Inability to Ascertain the Value of the Contract Rights Distributed to the Stockholders Upon Dissolution of the Corporations.

Petitioner Ann H. Beck is, and at all times material hereto was, the wife of petitioner Myron P. Beck, and petitioner Mary Gersten is, and at all times material hereto was, the wife of petitioner Milton Gersten. The petitioner wives filed joint returns for the taxable year 1950, here involved, with their respective husbands and are parties hereto solely for that reason. All of the petitioners kept their books and reported their income on a cash basis [F. of F., R. p. 69]. All references herein to petitioners, respecting this issue, will refer to petitioners Albert Gersten, Myron P. Beck and Milton Gersten.

Said petitioners¹ were stockholders of four corporations which were engaged in the business of subdividing tracts of land, constructing houses thereon and selling such houses [F. of F., R. p. 69].

The extension of pipelines for water service was essential to the subdivision of said tracts and the sale of the houses constructed thereon. In order to provide water facilities for the subdivisions here involved, contracts were entered into with the San Gabriel Valley Water Company (sometimes hereinafter referred to as "San Gabriel"), which agreed to extend its water lines into the subdivisions in question, conditioned, however, upon payments by the subdividing corporations of the cost of such extensions [F. of F., R. p. 69].

Under the contracts, San Gabriel was to make payments to the subdividing corporations on the basis of its gross receipts from the sale of water to homes in the particular subdivision. The payments were to terminate in some cases ten years from the date of the contract and in others ten years from the date the lines were completed, or earlier, if the full amount should have been paid prior to the end of the ten-year period. Accordingly, the subdividing corporation might or might not receive payment in full. The corporations did not hold title to the facilities [F. of F., R. p. 70].

The four corporations were all dissolved by December 31, 1950. Substantial amounts of their original payments to San Gabriel remained unpaid at the time of their dissolution, and the right to receive repayments pursuant to such contracts, which were fully transferable,

¹Petitioner Milton Gersten was a stockholder of only two of the four corporations involved.

were assigned to petitioners, as stockholders, upon the dissolution of the corporations [F. of F., R. p. 70]. Petitioners did not assign any value to their respective interests in such contracts, in arriving at the gain realized upon liquidation of the corporations. Respondent determined that the rights under each of the contracts did have a fair market value when they were received by the stockholders in liquidation, and accordingly, in his determination of deficiencies herein increased the amount of capital gain realized [F. of F., R. p. 71]. Respondent determined that each of such contracts had a value of 50% of the maximum balance which might, as of the time of dissolution, become payable by San Gabriel [F. of F., R. pp. 73, 75, 77 and 78].

The minimum rate per month for water consumers which was charged by San Gabriel during the periods 1948, 1949 and 1950 was \$1.25 [F. of F.; Stip. Par. 75, R. p. 121] but none of the purchasers of any of the residences included in any of the tracts involved were required, by or in connection with the contract of purchase of the residence, to use or purchase water from San Gabriel, in any amount, or for any period, or at all [F. of F.; Stip. Par. 64, R. 120].

In its findings of fact, the Tax Court held, as an ultimate fact, that the contracts each had a fair market value, at the respective dates of dissolution, equal at least to the amounts determined by respondent [F. of F., R. pp. 73, 75, 77 and 79]. This ultimate fact was inferred by the Court, apparently from its finding of the evidentiary fact that similar contracts were bought and sold [F. of F., R. p. 70].

The questions presented on this issue are (i) at the dates of dissolution of the corporations, did the respective

contracts have an ascertainable fair market value, and (ii) even assuming such ascertainable fair market value, were petitioners required to include in their income tax returns for years prior to actual receipt, any amount subsequently paid in respect of such contracts. A negative answer to either of these questions requires a reversal on this issue.

ISSUE II.

Was Petitioner Albert Gersten Entitled to File a Joint Return for the Taxable Year 1950 With His Wife, Bernice Ann Gersten.

On April 3, 1950, Lucille Gersten obtained an interlocutory decree of divorce from petitioner Albert Gersten (herein sometimes called "Albert") in an action filed in the Superior Court of the State of California in and for the County of Los Angeles. On November 2, 1950, Albert obtained a final decree of divorce from Lucille Gersten in the First Civil Court of the State of Chihuahua of the Republic of Mexico, sitting at Juarez. On the same date, immediately following the Mexican decree, he married Bernice Ann Gersten (herein sometimes called "Bernice") in Juarez. The California interlocutory decree was not final on the date of the Mexican divorce and marriage. At all times during the year 1950, Albert and Bernice were residents and domiciliaries of the State of California [F. of F., R. p. 80].

The parties stipulated to, and no dispute exists concerning, the facts found by the Tax Court on this issue. The trial court held that, on the basis of those facts, Albert and Bernice were not legally married during 1950, and that accordingly they could not file a joint income tax return.

The sole question presented by this issue is whether or not petitioner Albert Gersten could file a joint income tax return for the year 1950 with Bernice, pursuant to the provisions of Section 51(b) of the Internal Revenue Code of 1939.

As to Both Issues.

On August 24, 1953, the Commissioner sent to each of the petitioners, by registered mail, a notice of the deficiencies here involved [R. pp. 19, 39 and 55]. Within ninety days thereof, petitioners filed petitions for redetermination of the deficiencies with the Tax Court of the United States [R. pp. 7, 27, and 47] and on April 29, 30 and May 1, 1955, a hearing was had before the said Tax Court [R. p. 123]. On June 28, 1957, the Honorable Bolon B. Turner, Judge, entered the Findings of Fact and Opinion [R. p. 61] wherein it was found and held, as to the issues here involved, as described above.

SPECIFICATION OF ERRORS.

ISSUE I.

1. The Tax Court erred in determining, as an ultimate fact, that the contract rights received by petitioners from the dissolution of the corporations had an ascertainable, as distinguished from an unascertainable, fair market value.

2. The Tax Court erred in determining, as an evidentiary fact, that there existed a market in which contracts of the kind here involved were regularly traded in or regularly bought and sold. There is no evidence in the record to support or justify such a finding.

3. The Tax Court erred in failing to determine that, because petitioners used the cash receipts method of

accounting, they were not required to report receipts from the contracts here involved prior to the year of actual receipt.

4. The Tax Court erred in determining that there was any deficiency in the income taxes, for the year 1950, of any of the petitioners, by reason of additional capital gains attributable to the receipt, on dissolution of the corporations, of the contract rights.

ISSUE II.

1. The Tax Court erred in determining that, in 1950, petitioner Albert Gersten, and Bernice Anne Gersten, were not husband and wife, under the laws of the State of California, and accordingly were not entitled to file a joint income tax return for that year.

2. The Tax Court erred in determining that there was a deficiency in petitioner Albert Gersten's income taxes for the year 1950, attributable to the disallowance of his election to file a joint income tax return for 1950 with Bernice Anne Gersten.

SUMMARY OF ARGUMENT.

ISSUE I.

1. The rights which petitioners received, under the contracts assigned to them on the dissolution of the corporations, were rights, subject to a ceiling amount, to receive payments from San Gabriel measured by a percentage of amounts received by San Gabriel from the sale of water, during a limited period of time, to certain of its customers.

2. Because of future unpredictable conditions respecting the purchase of water by San Gabriel's customers, there is, and at the dates of dissolutions was, no way to

ascertain the fair market value of the rights under the contracts. This principle has been too well established by the Supreme Court of the United States, by this Court as well as several of its sister appellate courts, and by the Tax Court itself, in a number of cases, to permit its rejection here.

3. The fact that (i) the limited time during which the contract rights would continue ranged from approximately seven to nine years, (ii) that some of the payments under the contracts had actually commenced prior to dissolution, (iii) that experts testified that an average of 70% of the maximum receipts from contracts similar in form and nature to those here involved, but with some paying much less than 70%, and some more than that amount, depending upon the particular circumstances of each case, (iv) the existence of six isolated sales out of several hundred similar contracts then existing, made at unknown times, prices or terms, or all of these four facts collectively, creates no certainty and furnishes no reasonable standards from which a fair market value may be reasonably ascertained.

4. In any event, six isolated sales out of several hundred similar contracts in existence do not justify the drawing of an inference either that there existed (i) a market in which such contracts were regularly traded in, or (ii) an ascertainable fair market value. This appellate court is not bound by such erroneous inferences or conclusions.

5. In any event, the well established annual accounting concept for income tax purposes precludes the requirement that taxpayers report receipts from such contracts as income prior to the year of actual receipt.

ISSUE II.

1. Congress' objective in enacting Section 51(b) of the Internal Revenue Code of 1939 was to give husbands and wives from noncommunity property states income tax benefits equivalent to those from community property states. Accordingly, its concept of "husband and wife" had reference to a marital status or relationship which, under state law, would permit them to file income tax returns on a community property basis if they were residents of community property states.

2. The determination of such a marital status depends upon state law. Under the laws of the state of California, of which petitioner Albert Gersten, and Bernice Ann Gersten, were residents and domiciliaries, a Mexican decree of divorce obtained by Albert, with the aid of Bernice, from his prior wife, and the Mexican marriage, resulted in a status, as between Albert and Bernice, of husband and wife.

3. A contrary status for the purpose of the income tax laws would make the administration thereof impossible in this area. It must be assumed that Congress intended no such difficulties or incongruous result. By executive interpretation, the Commissioner of Internal Revenue, charged with the administration of the income tax statutes, has so assumed, and has conceded for this purpose, a recognition of Mexican divorces and marriages.

4. Accordingly, in view of their status as husband and wife under California law, and under respondent's own general interpretation of the statute involved, the rejection by the Tax Court of the election by Albert and Bernice to file a joint income tax return for the year 1950, was erroneous.

ARGUMENT.

ISSUE I.

A. The Ability or Inability to Ascertain the Value of the Contract Rights Distributed to the Stockholders Upon Dissolution of the Corporations.

1. Introductory.

On the dissolution of the four corporations,² the rights to receive payments from San Gabriel were transferred and assigned to the petitioners as stockholders. At that time San Gabriel's obligation as to each contract, was to pay petitioners an amount equal to $33\frac{1}{3}\%$ or 35% of the amounts which San Gabriel received for the use of water from the occupants of the houses in the area covered by the respective contracts. San Gabriel's obligation was limited by the then balance of a maximum amount stated in each contract and was terminated in any event after a date less than ten years from each date of dissolution, whether or not the aggregate of its payments under the contract equaled said maximum.³ Neither San Gabriel nor the stockholders could compel the owners of the residences in any of the tracts covered by the contracts to occupy said residences or to use or purchase water from San Gabriel in any amount, or for any period, or at all.⁴ On the other hand, at the time of dissolution, the houses were occupied and the occupants were purchasing water from San Gabriel so that the stockholders could expect to receive some payments from San Gabriel pursuant to the provisions of the contracts, but with no as-

²Respectively on December 31, 1950, December 28, 1950, November, 8, 1950, and June 22, 1950.

³F. of F. Ex. 1 through 7, which formed part of the Stipulation.

⁴F. of F. Stip. Par. 64, R. p. 120.

surance as to what extent, at what rates, or for how long a period of time, since as indicated these factors depended upon activities of and transactions by persons over whom neither San Gabriel nor the stockholders had control.

2. The Contract Rights, in All Material Respects, Are Indistinguishable From the Contracts Involved in *Burnet v. Logan*⁵ and *Westover v. Smith*.⁶ Accordingly, They Must Be Held to Have No Ascertainable Fair Market Value at the Time of Dissolution.

As indicated by the record references, the foregoing facts were not merely proved by petitioners, but were stipulated to by petitioners and respondent and specifically adopted by the Tax Court as a part of its findings of facts. Accordingly, without more, it would seem that the instant case comes squarely within the blanket of and is controlled by the cases of *Burnet v. Logan*, 283 U. S. 404; *Westover v. Smith*, 173 F. 2d 90; *Commissioner v. Carter*, 170 F. 2d 911; and *J. C. Bradford v. Commissioner*, 22 T. C. 1057, at 1070 (1954), which held that contracts of this nature, having the elements of the contracts here involved, have *no ascertainable* fair market value.

That being so, petitioners, under the principles of said cases, were not required to attribute any value to the water contracts in determining their respective gains upon the liquidation of the corporations.

In the *Logan* case, the taxpayer sold shares of stock for a fixed amount plus additional contingent amounts measured by sixty cents per ton of 12% of the ore mined by a subsidiary of the corporation whose shares

⁵283 U. S. 404.

⁶173 F. 2d 90.

were being sold. The contract did not and could not impose any obligation upon the subsidiary (which was not the purchaser) to mine one or more tons of ore, although the subsidiary was, at the time of the sale, engaged in the business of mining and selling the ore, and, from the opinion in the case, it is apparent that no one contemplated, as a matter of possibility or probability, that it would not continue to do so. The Commissioner, viewing the sale as an entirely closed transaction, sought to value this contingency, or contingent right, and fix a fair market value as of the date of the sale.⁷

The Supreme Court pointed out that, although such a valuation was necessary for estate tax purposes, since such a determination must be made once, in connection with that tax, it was entirely unnecessary to attempt to value, for income tax purposes, a contract which depended upon contingencies over which the seller had no control and in respect of which the buyer was under no legal obligation to perform. In this connection the court stated (at p. 412):

“Nor does the situation demand that an effort be made to place according to the best available data some approximate value upon the contract for future payments. This probably was necessary in order to assess the mother’s estate. As annual payments on account of extracted ore come in they can be readily apportioned first as return of capital and later as profit. The liability for income tax ultimately can be fairly determined without resort to mere estimates, assumptions and speculation.”

⁷In fact, 11/80ths of the total contract in question had been acquired by the taxpayer from her mother’s estate, and for estate tax purposes that fraction had been valued at two hundred seventy-seven thousand odd dollars.

In *Westover v. Smith, supra*, the taxpayer was the owner of all of the stock of a corporation engaged in the manufacture and sale of machine tools. After the corporation had sold all of its assets to another in exchange for cash and the right to receive 10% of the gross sales price of machinery to be manufactured pursuant to patents theretofore owned by it, taxpayer liquidated the corporation. The distribution in liquidation netted the taxpayer cash in excess of her basis for her stock and, in addition, the assignment of the contract under which the future contingent payments were to be made. The Court stated (at p. 91) that

“while the contractual rights she held *had a very substantial value*, there was, owing to future business contingencies, no way of ascertaining its fair market value. Therefore, the taxpayer assigned no value to the contract on liquidation, but reported the later payment as capital gains representing ‘an integral part of the liquidation distribution.’” (Emphasis added.)

The government contended that the *Logan* case did not apply because it did not involve a corporate distribution. The Court disagreed on the ground that the profits “arose directly out of the contract” distributed by the corporation, and stated that distributions “are treated in the same manner as sales,” going on to state (at p. 92):

“It is clear that the contract itself was a distribution under section 115(c). Its taxable valuation is its fair market value, according to section 111(b) of the Internal Revenue Code. Although there was no ascertainable fair market value at the time of liquidation, we find nothing in the statute requiring the market value to be measured immediately. In

such a situation *the only practicable and accurate method of measuring the contract's value is through the application of money to such valuation as it is received.*" (Emphasis added.)

In its decision, the Court relied upon *Burnet v. Logan, supra*, which it described as "a case which presents a factual situation almost identical with that of the instant case."⁸

Commissioner v. Carter, supra, also relied squarely upon *Burnet v. Logan*. In that case the contracts involved called for payment of commissions to the liquidating corporation in respect of services which were completely rendered but the payments were entirely contingent upon the happening of events which neither the liquidating corporation nor the recipient stockholder had a legal right to control. Applying the principles of the *Logan* case, the court there held that no value should be placed upon said contingent contract at the time of liquidation, but that after payments upon the contract were received they were required to be taken into income by the stockholder as additional capital gains.

In *Bradford*,⁹ the facts on this issue are virtually identical with the facts in the instant case, except that the payments from the utility company there involved related to power lines rather than water pipes. There, taxpayer, in complete redemption of her preferred stock received "the benefits under a contract dated September 2, 1942, between Mobile Homes, Inc.¹⁰ and the Alabama Power

⁸At page 92.

⁹22 T. C. 1057 (1954).

¹⁰The subdivider whose preferred stock was being redeemed from taxpayer.

Company. . . . It [the power company] required Mobile Homes, Inc. to advance the money to run the wires into the project. In return, Mobile Homes, Inc., was to receive 20 per cent of the net income that the Alabama Power Company realized upon power sales to the occupants of the houses.”¹¹ The Commissioner contended that in respect of payments made by the power company to taxpayer after the dissolution, that the taxpayer realized ordinary income rather than a capital gain. In rejecting Commissioner’s contention, the Tax Court stated (at p. 1072):

“Ordinarily, if the value of the right received exceeds the cost basis of the stock redeemed, a gain will be realized by the taxpayer when the exchange is made. But in the instant case the Alabama Power Company’s contractual right had no ascertainable fair market value when it was received by Eleanor. Under circumstances indistinguishable from those here present, it was held in *Commissioner v. Carter* (C. A. 2), 170 F. 2d 911, affirming 9 T. C. 364, and *Westover v. Smith*, 173 F. 2d 90, that where the contractual right received in exchange for the stock has no ascertainable fair market value, no gain is realized until the payments exceed the cost basis and, thereafter, the payments are taxed as capital gains. The above cases rely primarily upon *Burnet v. Logan*, 283 U. S. 404, which, we agree, is controlling. The fact that the payments are to be received from a third party rather than from the corporation purchasing the stock is immaterial. The fair market value of the contractual right received is equally unascertainable,”

¹¹At page 1065.

The most recent Tax Court decision on the subject appears to be *Lentz v. Commissioner*, 28 T. C., No. 136, decided in September, 1957. In that case, the Tax Court, following *Logan, Smith, Carter and Bradford*, held that the right to receive future commissions contingent upon the consummation of mortgage transactions by third parties not legally required to do so, but of a type which immediately prior and subsequent to dissolution were being consummated, had no ascertainable fair market value for the purpose of measuring the gain of the recipient stockholders upon distribution to them in liquidation.

In addition to the *Smith, Carter, Bradford* and *Lentz* decisions, the principles of the *Logan* case have been applied in many decisions, with respect to many types of contingent receipts, including those measured by oil or gas production,¹² profits of a mine or quarry,¹³ earnings of a patent,¹⁴ dividends paid by a corporation,¹⁵ brokerage commissions paid by specified customers,¹⁶ and renewal commissions over a stated period of years, and a percentage of the purchaser's net operating profits for five years.¹⁷

¹²*Commissioner v. Moore*, 48 F. 2d 526 (C. C. A. 10, 1931); *Commissioner v. Garber*, 50 F. 2d 588 (C. C. A. 9, 1931); *Commissioner v. Edwards Drilling Co.*, 95 F. 2d 719 (C. C. A. 5, 1938); *Kay Kimbell*, 41 B. T. A. 940 (1940); *Rocky Mountain Development Co.*, 38 B. T. A., 1303 (1938); *Hunt Production Co.*, 38 B. T. A. 457 (1938).

¹³*George James Nicholson*, 3 T. C. 596 (1944); G. C. M. 9798, X-2, Cumulative Bulletin 221 (1931).

¹⁴*Commissioner v. Hopkinson*, 126 F. 2d 406 (C. C. A. 2, 1942); *Cf., United States v. Carruthers*, 219 F. 2d 21 (C. A. 9, 1955).

¹⁵*Estate of Raymond T. Marshall*, 20 T. C. 137 (1953).

¹⁶*Cassatt v. Commissioner*, 137 F. 2d 745 (C. C. A. 3, 1943).

¹⁷*Jones v. Squire*, 56-2 U. S. T. C. Par. 9669 (D. C., Wash.).

The reasoning of the above cases is applicable to the instant case. There is no question that it was contemplated by the corporate taxpayers and by San Gabriel, which was to make these contingent payments, that the contingency would probably arise, although to what extent, at what rate and for what period of time could not be known by either of the contracting parties. But here, as in the *Logan* case, though it was probable that the contingency would arise to some extent, it is entirely unnecessary to concern ourselves with it.

Although it appears that the facts here involved, specifically including the nature and concept of the contingent rights received by the stockholders in respect of the water contracts are indistinguishable from the facts and the nature of the rights involved in the *Logan*, *Smith*, *Carter*, *Bradford* and *Lentz* cases, the Tax Court nevertheless distinguished *Smith* and *Carter* in the following language:¹⁸

“In *Westover v. Smith*, *supra*, and *Commissioner v. Carter*, *supra*, the facts were that contractual rights received upon the dissolution of the corporation had no ascertainable fair market value. Here the facts are otherwise. See *Pat O'Brien*, 25 T. C. 376.”

The *O'Brien* case is indeed distinguishable from the *Smith* and *Carter* cases, but it is also distinguishable, for the identical reasons, from the case here involved, and the Tax Court's reliance upon it was erroneous. In the *O'Brien* case, taxpayer was a former stockholder of a corporation which produced a motion picture photoplay which was financed by Columbia Pictures Corporation.

¹⁸Opinion, R. p. 84.

The producer, of course, owned the motion picture photograph, but entered into a distribution or lease and license agreement with Columbia for the distribution and exploitation of the motion picture by Columbia. Columbia also agreed to assist in the financing of the production. Shortly after the completion of the production and the release for distribution of the motion picture, the corporation was dissolved and there was a transfer in liquidation to the stockholders, including taxpayer, of all of the corporation's right, title and interest *in the motion picture*. This transfer was subject to the rights of Columbia to lease and license the motion picture under the distribution agreement. As a result of the dissolution, taxpayer reported a capital gain measured by cash over basis for stock plus the fair market value of his proportionate interest in the motion picture. Thereafter taxpayer reported his share of the receipts from the motion picture, in excess of his basis thereof,¹⁹ being the fair market value at the time of the dissolution, as ordinary income. The Court found that in fact the fair market value of taxpayer's right, title and interest in the motion picture was the amount reported by him in his income tax return.

Subsequently, upon respondent's determination of deficiencies for other reasons, in the litigation, taxpayer contended that the sums received by him in excess of his basis, that is the fair market value at distribution, and theretofore reported as ordinary income, should have been reported as additional capital gains. In support of this position, he relied on *Westover v. Smith* and *Susan J. Carter*.

¹⁹Presumably taxpayer treated all receipts up to the fair market value as allowable depreciation.

In distinguishing those cases, the Tax Court there pointed out that the interest in the motion picture photoplay which taxpayer received had a readily ascertainable fair market value at the time of dissolution, and the distribution of the asset was a closed transaction for federal tax purposes, whereas, in the *Smith* and *Carter* cases the dissolution of the corporations was not a closed transaction for tax purposes with respect to assets which had no fair market value on the date of dissolution. What is unsaid, but obvious from the opinion, is the fact that in that case, the taxpayers at dissolution received an asset *the use and exploitation of which produced income* and it was that income which the taxpayer had reported as, and the Court held to be, ordinary income. In *O'Brien*, the income had no direct relation to the exchange but *issued from* and was produced by the *rental of the property* which taxpayer had received in the dissolution exchange. In *Smith*, *Carter* and the instant case, the stockholders received, in exchange for their stock in the dissolved corporation, not an asset which could be rented or otherwise exploited to produce rental or other income from its use, but the right to receive the very payments which constituted the income.

In this case, therefore, as in *Smith* and *Carter*, the question is simply whether respondent may, or for that matter, can, with any degree of accuracy, commute the payments into a principal sum of ascertainable value, which he can treat as a cash equivalent. In this case, as in *Smith* and *Carter*, the answer must be in the negative.

3. **An Analysis of the Evidentiary Findings of Fact, From Which the Tax Court Apparently Drew Its Erroneous Conclusion of Ultimate Fact, Reveals That No Distinction From Logan and Smith Exists.**

In support of its ultimate finding of fact that the water contracts here involved did have a fair market value at dissolution, the Tax Court, in its opinion, cites the following elements:²⁰

(i) None of the contracts were as much as three years old at the time of distribution.

(ii) The payments under them had commenced on all except the Lawrence contract, on which they began shortly thereafter. All houses had been completed and sold by the time each corporation dissolved.

(iii) Expert witnesses testified that one might expect to receive as much as 70% of the total original payment on contracts similar to those here involved.

(iv) Expert witnesses testified that contracts similar to those here were bought and sold.

As to items (i), (ii) and (iii) all were clearly present as evidentiary facts in the *Logan*, *Smith* and *Carter* cases.

(i) *The Age of the Contracts.*

The only point of the finding in subparagraph (i), as to the three-year age of the contracts, can be to indicate that payments might be made thereon for a period as long as seven years.²¹ However, in *Logan* there was no limitation of time whatever, a fact more favorable to the determination of value than here; nor was there an

²⁰R. pp. 83 and 84.

²¹Note that at dissolution all of the contracts had remaining less than the original ten-year term. [F. of F. Ex. 1-7.]

express limitation of time in the *Smith* case, although perhaps the limited life of the patents might have furnished such a limitation.

(ii) *The Probability That Some Payments Would Be Made.*

The only point here involved can be the fact that some payments undoubtedly would be made, and were being made and for that matter were accruing at the very time of dissolution. But that was precisely the fact in *Logan*, *Smith* and *Carter*. In the *Logan* case, large but varying amounts of ore, the measure of the contract payments, had been and continued to be mined prior and subsequent to the date of the sale; in the *Smith* case, machinery was being manufactured by the purchaser at the time of dissolution, as a result of which the contractual right, as the Court said, "had a very substantial value," and in the *Carter* case, the third party transactions in respect of which the commissions representing the contractual rights were to arise were pending at the time of dissolution.

(iii) *The so Called Predictable Average.*

It is obvious that in each of those cases the recipient under the contract right expected to receive substantial amounts as a result of the contract.

The Tax Court did find that "*under normal conditions*, approximately 70 per cent of the original [maximum] payment might be expected on such [similar] contracts."²²

²²Emphasis added. [F. of F., R. p. 70.] This finding was the second part of a compound sentence, the first part of which referred to sales of such contracts. Since, as demonstrated later, there was no evidence whatever tying in the 70 per cent with sales, it is assumed that the finding related to the average payout by San Gabriel upon all of its contracts of this type, and not to any average or suggested sales price.

The only testimony in the record concerning the question of estimated future receipts from similar contracts is to be found in the testimony of Mr. Moseley and Mr. Garnier, who, presumably were the experts to whom the Tax Court referred. The testimony of Mr. Moseley on this subject is somewhat equivocal, but what evidence he gave on the subject is found on pages 200, 201 and 202 of the record. Without taking into account economic depressions, floods, earthquakes, droughts and less than full occupancy (none of which factors can be readily brushed aside in the Los Angeles County area) Mr. Moseley estimated that, *as an average*, it would be conservative to estimate that 70 per cent of the payments made in San Gabriel in respect of all their contracts, might be expected to be refunded. He made it clear, however, that even ignoring the factors above mentioned, "some would pay off *much less* than seventy per cent." (Emphasis added.) He did not testify as to whether he considered the particular contracts here involved were below, equal to or above the average.²³ Mr. Garnier testified in the same vein, emphasizing that he was speaking of an average, and substantially agreed with Mr. Moseley.²⁴

In the face of the foregoing evidence, it is difficult to see how the Tax Court is justified in inferring from the existence of an average estimated payment (without regard to factors unfavorable to payment under the contracts) computed on the basis of hundreds of contracts,

²³For convenience, Mr. Moseley's entire testimony on this subject is reproduced in the Appendix, pp. 9 and 10.

²⁴[R. pp. 237 and 238.] For convenience, Mr. Garnier's entire testimony on this subject is reproduced in the Appendix, pp. 6, 7, 8 and 9.

the conditions of and the factors concerning which are not in the record, that the contracts here involved, *even subject to the proviso that in the future normal conditions prevail*, may reasonably be expected to pay 70 per cent of their respective maximums. Such an inference necessarily requires too many intermediate assumptions, and the finding must fall. Such an inference is as unsound as one which concludes that the price of any given stock listed on the New York Stock Exchange is the average of the prices of all of the stocks listed on that exchange.

But assuming, *arguendo*, that the finding "under normal conditions, approximately 70 per cent of the original payments might be expected on such [similar] contracts" is properly inferred, the additional inference required to be made by the Tax Court to find, as an ultimate fact, that the contract rights here involved have an ascertainable fair market value, runs afoul of the principles enunciated in the *Logan*, *Smith*, *Carter*, *Bradford* and *Lentz* cases. If those cases stand for anything, they stand for the proposition that for the purpose of determining a taxpayer's income in any given year, for income tax purposes, it is unnecessary, at sale or dissolution, to assume or determine what conditions, normal or abnormal, will obtain in future years, insofar as third persons, not legally bound, are concerned. It was the Supreme Court's refusal to assume that the future mining of ore might or should be measured by the past actions of third persons which led to its conclusion that there be no commutation of estimated future receipts; it was this Court's refusal, in the *Smith* case, because of future business contingencies, to assume that future sales of patented machinery might or should be measured by past sales, which lead to a similar conclusion that there be no commutation of future

receipts. In the face of the unpredictable variables from normal conditions, as found by the Tax Court itself,²⁵ it is submitted that the Tax Court's finding of ultimate fact that the contract rights here involved had, on dissolution, an ascertainable fair market value, is an erroneous disregard of the rule laid down by the Supreme Court in the *Logan* case, by this Court in the *Smith* case, and by the Tax Court itself in the *Bradford* and *Lentz* cases.

(iv) *The Alleged Buying and Selling of Similar Contracts.*

As indicated above, the Tax Court made a further finding of evidentiary fact that "similar contracts to those here in issue were bought and sold."²⁶ If this finding is intended to mean no more than the fact that at some time or times between 1937 and April 29, 1955, there were sales of six similar contracts, one at least taking place after April, 1953,²⁷ and in respect of which the terms of sale were unknown as to five, and as to

²⁵[*Cf.* F. of F., R. p. 70.] Such as weather conditions involving excessive rainfall, economic recession induced decrease of plantings for irrigation and economic recession induced decrease of acquisition of water consuming appliances.

²⁶[F. of F., R. p. 70.] Although as part of the same sentence, the opinion continued with the expression "and, under normal conditions, approximately 70 percent of the original payment might be expected on such contracts", petitioners assume, because there is no evidence whatever to support a contrary assumption, that the Tax Court did not find or intend to find that such sales, as distinguished from payments from the contracting water company, might be expected to produce "approximately 70 per cent of the original payment", that is, the maximum amount payable under such contract. The evidence, referred to above, concerning the "70 per cent average" had no reference to sales. Moreover, the telescoping in one sentence of the two separate matters seems apparent by the use of the words "original payment", since obviously, any sale which might take place after there was less than 70 per cent unpaid could not hope to call for a premium price, in the face of future contingencies and the absence of interest.

²⁷[R. p. 231.]

the sixth the price was \$840 for a contract having a maximum balance of \$6,800, then petitioners do not dispute the accuracy of such evidentiary finding.

Petitioners insist that such evidentiary finding must be so limited, however, because in the entire record, the only evidence of sales of contracts of this type is to be found in the testimony of the witnesses Moseley and Garnier, who are presumably the experts to whom the Tax Court is referring. Mr. Moseley's entire testimony on the subject of sales discloses that he knew of four sales, in all, which he could not pin down as to time, with reference to the year 1950, or at all.²⁸ As a supplement to the foregoing evidence, petitioners refer to the fact that they and respondent stipulated²⁹ that on July 1, 1950, San Gabriel had outstanding 277 water facilities contracts of the type here involved. The record also discloses³⁰ that Mr. Moseley had been employed with San Gabriel from 1937 to beyond the date of the hearing.

Mr. Garnier's testimony on the subject of sales disclosed that he and his sister jointly had purchased one such similar contract, four years after the tract to which it applied had been fully occupied, for approximately 13 per cent of its then face amount, and that his construction company had purchased, not earlier than April, 1953, one other such similar contract.³¹ The time of the first sale, with reference to the dates here in-

²⁸[R. pp. 187 and 188.] For convenience, Mr. Moseley's entire testimony on this subject is reproduced in the Appendix.

²⁹[F. of F., Supp. Stip., R. p. 122.]

³⁰[R. p. 177.]

³¹[R. pp. 227-231.] For convenience, this portion of Mr. Garnier's testimony is reproduced in the Appendix.

volved, was not pinpointed. The terms of the second sale were not furnished. Mr. Garnier did not testify concerning any other sale, whether or not he was directly or indirectly involved, and there is nothing in the record to suggest that he was aware of the existence of any other sale.

The evidence, then, at best, indicates that there were six specific sales out of several hundred of similar contracts, at unknown prices, except as to the 13 per cent sale, with times of sale unknown, except as to one later than April, 1953, more than two years after the last pertinent date here involved, and with all other terms of sale unknown.

If, therefore, the Court's phraseology respecting the finding that "similar contracts . . . were bought and sold" is intended to indicate that a market existed in which buyers bought and sellers sold similar contracts with reasonable regularity or continuity and, the Tax Court has found the existence of a market by drawing an inference from the fact of the six isolated sales of uncertain date, price and times, petitioners do dispute such a finding as being unsupported by the record and the evidentiary facts found. Such an inference would stretch the imagination beyond credulity, particularly in the light of the language of the *Logan* opinion, which demonstrates the undesirability of indulging in mere "estimates, assumptions and speculation."³²

³²283 U. S. 404, at page 412.

4. The Evidentiary Facts and Findings Did Not Justify Intermediate Inferences and the Inference of Ultimate Facts Made by the Tax Court.

None of the foregoing evidentiary facts nor all of them together were sufficient to justify an inference that the contractual rights had an *ascertainable* as distinguished from an *unascertainable*, fair market value. On the contrary, because payments depended upon transactions over which the holders of the contract rights had no control, it followed, in the words of the Court of Appeals in the *Smith* case, that "there was, owing to future business contingencies, no way of ascertaining its [the contract's] fair market value." In the instant case, as in the *Smith* case, there were unpredictable contingencies or factors which would affect the future use of water by the consumers, which in turn would affect the payments to be made by San Gabriel pursuant to the contracts. Among the factors found by the Tax Court [F. of F., R. p. 70] which would thus affect, in any year of the term of the contract, the use of water were (a) weather conditions (b) the amount of plantings and vegetation requiring irrigation and (c) the number of water consuming appliances owned by the occupants. Implied in the finding is the continued full occupancy during the remaining life of the contracts. The evidentiary findings, embraced by the stipulation, even for the short period from the date of complete occupancy to the date of the stipulation, demonstrate substantial variations from season to season and from year to year. One of such examples demonstrates that in the case of the J. Richard Co. Tract number 15062-14954, San Gabriel's average monthly payment was \$92.59 for the year 1952, whereas the monthly average payment for the year 1954 in respect of the same

tract and the same contracts amounted to \$214.69.³³ Perhaps it rained more in 1952 than it did in 1954, but if it did, petitioners suggest that they could hardly have evaluated such differential in the preparation of their 1950 income tax returns.

That the Tax Court has drawn the inference from six isolated sales to the existence of a market, and from the foregoing to the ultimate fact of existence of fair market value, is no bar to reversal. In situations where the ultimate fact is found by drawing inferences from evidentiary facts found by the Tax Court, it is well settled that because the reviewing Court is in as good a position to draw its own inferences or conclusions as is the trial court, that the Courts of Appeal will feel free to do so. (*Kuhn v. Princess Lida of Thurn & Taxis*, 119 F. 2d 704 (C. C. A. 3, 1941); *Murray v. Noblesville Milling Co.*, 131 F. 2d 470 (C. C. A. 7, 1942), cert. den. 318 U. S. 775, 87 L. Ed. 1145 (1943).) For further authority in support of this principle see *Adams County v. Northern Pacific Railway Co.*, 115 F. 2d 768 (C. C. A. 9, 1940), where this court applied the same rule to findings of a special master and *Stubbs v. Fulton National Bank of Atlanta*, 146 F. 2d 558 (C. C. A. 5, 1945), cert. den. 325 U. S. 864, 89 L. Ed. 1984 (1946).

Moreover, the reviewing Court may draw its own inference of ultimate fact without regard to whether or not there is support in the record for the inference drawn by the Tax Court. That such was the intention of Congress in enacting the amendment to Section 1141(a) of the Internal Revenue Code of 1939 (now Sec. 7482) is apparent from the committee report relating to this amend-

³³[F. of F., Stip. Pars. 7 and 8, R. pp. 106-108.]

ment. There the Senate Committee on the Judiciary stated that the language used in the house bill and adopted by the Senate had the effect of repealing the rule laid down in *Dobson v. Commissioner of Internal Revenue*, 320 U. S. 489 (1943), "to the effect that decisions of the Tax Court on questions of fact, including questions of accounting and ultimate conclusions of fact, are not reviewable if supported by any evidence in the record." (Sen. Comm. on Jud., 80th Cong., 2d Sess. Report No. 1559, p. 131.) There we see the Senate Judiciary Committee drawing the distinction laid down in the *Kuhn* case, *supra*, as to questions of primary fact and ultimate conclusions of fact. Their very reference to that distinction makes it clear that it was the Congressional intent in enacting Section 1141(a) of the Internal Revenue Code to do away with the many times unfair result reached by applying the mandate of the *Dobson* case, particularly as such mandate related to review of ultimate conclusions of fact and inferences drawn from findings of evidentiary fact. It was the intention of Congress that Courts of Appeal sitting in review of decisions of the Tax Court of the United States should be free to reverse decisions of the Tax Court on question of ultimate fact and inference drawn from primary facts without reference to whether or not the conclusion of the Tax Court had support in the record.

Conclusion.

Only one reasonable conclusion can be reached from the facts which exist with respect to this issue—that the contract rights had no ascertainable fair market value and accordingly, petitioners were not required to include in their income for 1950, any amount attributable to the value of the contract rights.

B. Assuming Arguendo, an Ascertainable Fair Market Value, Petitioners, Being on the Cash Basis, Need Report Receipts Under Contracts Only in the Year of Receipt.

Even apart from the question of ability to ascertain the fair market value of the water contact rights at dissolution, petitioners contend that under the well established concept of annual accounting for income tax purposes, they need report only in the year of receipt, moneys payable to them by San Gabriel, subsequent to dissolution.

In this connection, petitioners rely upon the cases of *Kasper v. Banek*, 214 F. 2d 125 (C. A. 8th, 1954); and *Amend v. Commissioner of Internal Revenue*, 13 T. C. 178 (1949), and respondent's Revenue Ruling 58-162, I. R. B. 1958-15, 12. The facts in both of the cases, and set forth in the ruling, are substantially identical. In each case, a farmer using the cash receipts method of accounting, entered into a bona fide arms length contract of sale of his grain, calling for payment in the taxable year following that in which he delivered the grain to the purchaser pursuant to the contract. In each instance, it was held that the farmer was required to include the payment received by him from the seller in the year of receipt, and not in the year of sale.

While it is true that those cases related to a transaction involving a direct sale, in which the promise of the purchaser was treated other than a cash equivalent, petitioners submit that there is no real distinction between their position, as assignees of the dissolved corporations, and the corporations, which would be in the position analogous to that of the selling farmers. For this proposition, petitioners rely upon the rationale of *Westover v. Smith*, *supra*. In that case, as indicated above, the gov-

ernment sought to make the same distinction as between the taxpayer in *Burnet v. Logan*, *supra*, and the taxpayer in the *Smith* case, suggesting that the rule was different as between a direct seller and a recipient stockholder in a corporate distribution. As pointed out above, the attempted distinction was rejected by the court. Accordingly, if the recipient stockholder in a corporate distribution is in the same position as is the seller in the case of a direct sale, it follows that the stockholders here involved are in the same position as the taxpayers referred to in the *Banek* and *Amend* cases and the above cited Revenue Ruling.

On this alternative ground, therefore, petitioners are entitled to a reversal, on this issue, of the judgment of the Tax Court.

ISSUE II.

Was Petitioner Albert Gersten Entitled to File a Joint Return for the Taxable Year 1950 With His Wife, Bernice Ann Gersten.

1. Introductory.

Under Section 51(b) of the Internal Revenue Code of 1939,³⁴ husband and wife were permitted to file a single income tax return jointly. Petitioner Albert Gersten (sometimes herein called "Albert") and Bernice Ann Gersten (sometimes herein called "Bernice") so elected for the year 1950, but respondent determined that they were not legally married and accordingly treated the return as that solely of Albert.

The issue here involved, and the sole question to be determined, is whether, under the facts as here found,

³⁴Appendix, pp. 2 and 3.

Albert and Bernice were "husband and wife" within the meaning of those words as used by Congress in adding Section 51(b) to the Internal Revenue Code of 1939, in its enactment of The Revenue Act of 1948. The legislative history of that enactment demonstrates that it was intended to secure, for all married persons, whether or not they lived in the so-called community property states, equivalent income tax benefits which flowed from the existence of the community property laws.³⁵ It is submitted that in its use of the term, Congress did not intend to limit the phrase "husband and wife" to spouses whose status had the greatest degree of validity under local law, but intended it also to apply to two persons whose relationship to each other was of such a status, under local law, that had they been domiciliaries of a community property state, they would each own one half of the community income and thereby be entitled to avail themselves, for income tax purposes, of a division of that income in separate income tax returns, under the rule of *Poe v. Seaborn*, 282 U. S. 101.

2. **Petitioner Concedes That the Question of Marriage and Divorce Is Determined by State Law; but Under California Law, so Far as Petitioner and Bernice Are Concerned, They Are Husband and Wife.**

The trial court, in affirming the determination of respondent, insisted that for this purpose, "marriage, its existence and dissolution, is particularly within the province of the states," citing *Marriner S. Eccles*, 19 T. C. 1049, aff'd 208 F. 2d 796 and *Commissioner v. Ostler*, 237 F. 2d 501. With this conclusion, petitioner agrees; but it does not follow that only those husbands and wives

³⁵House Committee Rep., 1948 Revenue Act, C. B. 1948-1, p. 301.

whose marriages, under state law, involve no irregularities whatever, are "husband and wife" within Section 51(b). Parties to a voidable marriage are not the less husband and wife,³⁶ nor are parties to an irregular foreign marriage, where one or both are estopped from asserting the irregularity.³⁷

The case of *Spellens v. Spellens*, *supra*, decided by the California Supreme Court on October 30, 1957,³⁸ seems determinative of this issue. In that case, plaintiff wife sued her husband for a decree of permanent support and maintenance.³⁹ Plaintiff had been previously married to one Seymon, but obtained an interlocutory decree of divorce against him on March 13, 1951. Shortly thereafter, defendant took plaintiff to Mexico, where they consulted an attorney who advised them they could be legally married in Mexico. As a result, on March 17, 1951, four days after the entry of the interlocutory decree, plaintiff and defendant were married in Mexico and began living together as husband and wife. In March, 1952, after, as the court found, defendant had been guilty

³⁶Note that under California Civil Code Section 83 (Appendix, p. 2, 3) the ability to obtain a decree of nullity of marriage is limited as to time and parties, and in the absence of action by a proper party within the proper time, the marriage is as immune to attack as one without frailties subjecting it to risk of annulment.

³⁷*Cf. Spellens v. Spellens*, 49 A. C. 213.

³⁸The date of the Tax Court's order herein, but some four months after the entry of its opinion.

³⁹Under Section 137 of the California Civil Code (Appendix, p. 5) it is provided that "When the husband or wife has any cause of action for divorce as provided in this code, . . . he or she, as the case may be, may, without applying for a divorce, maintain in the Superior Court an action against her or him, as the case may be, for the permanent support and maintenance of herself or himself, . . ." Obviously, in such action, the plaintiff must be a husband or wife, and the other spouse must be the defendant or one of the defendants.

of cruelty to plaintiff, defendant suggested that they separate. Plaintiff commenced her action on March 24, 1952, but after a brief separation, the parties reconciled and lived together until defendant left plaintiff in September 1952. In an amended complaint, plaintiff asked that her marriage be declared valid and that defendant be estopped to question its validity. Defendant asserted, as an affirmative defense, that the marriage was void as being after the entry of the interlocutory decree but prior to the final decree, and asked that the Mexican marriage be declared invalid. Note that there had never been a Mexican divorce.

The trial court held that the marriage was invalid and plaintiff appealed. On appeal, the California Supreme Court, relying primarily on *Watson v. Watson*, 39 Cal. 2d 305, 307, 246 P. 2d 19, and *Rediker v. Rediker*, 35 Cal. 2d 796, 805, 221 P. 2d 1, 20 A. L. R. 2d 1152, reversed and held that defendant could not contest the validity of the marriage. In its opinion, the court, at page 221, quoting its prior quotation from *Rediker* in the *Watson* opinion, reiterated:

“*‘the validity of a divorce decree cannot be contested by a party who has procured the decree or a party who has remarried in reliance thereon or by one who has aided another to procure the decree so that the latter will be free to marry.’*” (The emphasis was furnished by the court.)

With respect to the public policy of the state of California, the Court, at page 222, quoting from *Dietrich v. Dietrich*, 41 Cal. 2d 497, 505, 261 P. 2d 269, had this comment:

“*‘The public policy of this state, in the circumstances of this case, as in those considered in Rediker v.*

Rediker (1950), 35 Cal. 2d 796, 808 (221 P. 2d 1, 21 A. L. R. 2d 1152) requires recognition of the second marriage rather than the "dubious attempt to resurrect the original" marriage.'" (Emphasis added.)

and went on to cite a long line of authorities.⁴⁰ At this point, too, it stated, "*Roberts v. Roberts*, 81 Cal. App. 2d 871, 185 P. 2d 381, insofar as it is to the contrary must be deemed as *disapproved*."⁴¹

On the question of the public policy of California respecting irregular foreign marriages, the Spellens opinion continued its quotation from *Dietrich v. Dietrich*, at page 222 and 223, as follows:

" 'Defendant contends, however, that the public policy of the state requires the annulment of bigamous marriages whenever their bigamous character is discovered. We find no basis for such a sweeping application of public policy. . . . Defendant does not indicate how any public purpose is served by the annulment of his marriage. . . .

⁴⁰*Rediker v. Rediker*, 35 Cal. 2d 796, 221 P. 2d 1, 21 A. L. R. 2d 1152; *Bruguiere v. Bruguiere*, 172 Cal. 199, 155 Pac. 988, Ann. Cas. 1917, 122; *Kelsey v. Miller*, 203 Cal. 61, 263 Pac. 200; *Harlan v. Harlan*, 70 Cal. App. 2d 657, 161 P. 2d 490; *Estate of Davis*, 38 Cal. App. 2d 579, 101 P. 2d 761, 102 P. 2d 545; *Hensgen v. Silberman*, 87 Cal. App. 2d 668, 197 P. 2d 356; *In re Kyle*, 77 Cal. App. 2d 634, 176 P. 2d 96; *Adoption of D. S.*, 107 Cal. App. 2d 211, 236 P. 2d 821; *Estate of Coleman*, 132 Cal. App. 2d 137, 281 P. 2d 567; *Union Bank & Trust Co. v. Gordon*, 116 Cal. App. 2d 681, 254 P. 2d 644; *Morrow v. Morrow*, 40 Cal. App. 2d 474, 105 P. 2d 129; 175 A. L. R. 538; 153 *id.* 941; 140 *id.* 914; 122 A. L. R. 1324; 109 *id.* 1018; Rest., Conflicts, Sec. 112. Note that the Tax Court erroneously relied on *Estate of Davis*, *supra*, cited above, which did not support its conclusion.

⁴¹The Tax Court relied strongly on *Roberts v. Roberts* and *Kegley v. Kegley*, 16 Cal. App. 2d 216, 60 P. 2d 482. The *Kegley* case contained the same rationale as the *Roberts* opinion, which relied strongly on *Kegley*.

“ “It can no longer be said that public policy requires non-recognition of all irregular foreign divorces. We have recognized that the interest of the state in many situations may lie with recognition of such divorces and preservation of remarriages rather than a dubious attempt to resurrect the original. From a pragmatic viewpoint, judicial invalidation of irregular foreign divorces and attendant remarriages, years after both events, is a less than effective sanction against an institution whose charm lies in its immediate respectability. We think it may now be stated that the *general* public policy in this jurisdiction, as judicially interpreted, no longer prevents application in annulment actions of the laches and estoppel doctrines in determining the effect to be given such divorce decrees.” (Vinson J., in *Goodloe v. Hawk*, 113 F. 2d 753, 757; *Harlan v. Harlan*, 70 Cal. App. 2d 657, 663-664 (161 P. 2d 490); *Krause v. Krause*, 282 N. Y. 355, 360 (26 N.E. 2d 290).) We conclude that the public policy of this state requires the preservation of the second marriage and the protection of the rights of the second spouse “rather than a dubious attempt to resurrect the original” marriage.” (*Rediker v. Rediker*, *supra*, 35 Cal. 2d 796, 806).”

The significant result of the *Spellens* decision is that because defendant was held estopped, the matter was remanded for further action requiring a determination of the amount of permanent support and maintenance to be awarded plaintiff, an award which under Section 137 of the California Civil Code could be made only against one spouse in favor of the other. Moreover, plaintiff's action for fraud in inducing the marriage was dismissed, because, as the court stated, at page 225, “. . . she, by the

estoppel, is receiving everything flowing from a valid marriage⁴² and we apply the same law as if they were validly married”

In the light of the *Spellens* case, there can be no doubt that neither Albert nor Bernice⁴³ could successfully assert against the other that they were not married. Accordingly, the only method by which either of them during their lifetime would have to change their marital status and relationship would be by way of an action for divorce.⁴⁴

3. The Cases Primarily Relied Upon by the Tax Court in Reaching a Contrary Conclusion Have Been Overruled or Disapproved. The Other Cases Cited by It on This Point Are Distinguishable.

In reaching its conclusion, the court in the *Spellens* case, placed a gloss upon Section 61 of the California Civil Code⁴⁵ which precludes the literal rigidity with which the Tax Court read that Section, and left no doubt that as between the plaintiff and the estopped defendant, they were husband and wife. It did so, at pages 223 and 234, in the following words:

“The foregoing authorities involved an estoppel to deny the validity of a decree invalid because of lack of jurisdiction of the court which purported to grant it *but we think the same policy requires the same result in the instant case where there was a marriage before a year after the entry of an interlocutory decree.* The policy applies equally in one

⁴²Including ownership of one half of the community income.

⁴³Albert for obtaining, and Bernice for relying on and aiding in, the Mexican decree. Cf. *Spellens v. Spellens*, at page 221.

⁴⁴Appendix, p. 5.

⁴⁵Appendix, p. 11.

case as the other. The policy against a bigamous marriage expressed in the first sentence of section 61 of the Civil Code, *supra*, involved in the cited cases, is no stronger nor more compelling than that involved here which is that there may not be a valid marriage if contracted within less than a year after the entry of an interlocutory decree of divorce. (Civ. Code, Section 61, subd. 1, *supra*.) We fail to see any difference in this case and one where defendant had participated in the obtaining of an invalid Nevada or Mexican divorce rather than a California interlocutory decree. It is not the marriage which is found valid as indicated by the above authorities and thus the policy of Section 61, subdivision 1, is not thwarted. Rather it is that defendant by reason of his conduct will not be permitted to question its validity or the divorce; so far as he is concerned, he and plaintiff are husband and wife." (Emphasis added.)

In support of its acceptance of what it referred to as the "express" provisions of Section 61 of the Civil Code, the Tax Court cited five cases as follows: *People v. Little*, 41 Cal. App. 2d 797, 107 P. 2d 634; *In re Elliott's Estate*, 165 Cal. 339, 132 Pac. 439; *In re Gregorson's Estate*, 160 Cal. 21, 116 Pac. 60; *Parmann v. Parmann*, 56 Cal. App. 2d 797, 107 P. 2d 634; *Vickers v. State Bar of California*, 32 Cal. App. 2d 247, 196 P. 2d 10. Of these, *Elliott* and *Parmann* were distinguished by the *Spellens* case as not discussing estoppel, the court there stating, at page 224, "insofar as they may be deemed contrary . . . they are overruled." *Estate of Gregorson* involved no divorce decree, valid or invalid, interlocutory or final, but simply related to the competency of an alleged incompetent to marry. *Vickers v. State Bar* similarly involved no decree, interlocutory, foreign or otherwise,

but simply a belief that divorce proceedings had been initiated, and as such is distinguishable. *People v. Little* may be indistinguishable, but is an earlier opinion, and of a lower court, and to the extent it cannot be distinguished, must also be deemed disapproved, and not to be followed in the face of *Spellens*, *Watson* and *Rediker*.

4. Administrative Requirements Preclude a Concept of a Marital Status for Tax Purposes Different From the Marital Status Under Local Law; and the Commissioner of Internal Revenue, by Concurrent Executive Interpretation of a Statute in Pari Materia to Section 51(b) of the Internal Revenue Code of 1939, has so Determined.

It would be incongruous indeed, if the Commissioner of Internal Revenue were permitted to cast aside this marriage relationship without cause given by either spouse when the California courts could not do so in the absence of proof, properly corroborated, of one of the seven grounds for divorce provided for in Section 92 of the California Civil Code (Appx. p. 5). Moreover, such action by the respondent would result in an administrative nightmare. If, for income tax purposes, respondent may reject Bernice as Albert's wife, he may not then reject Lucille, the former wife whom the respondent persists in recognizing as the true and only wife, and may not, therefore bar Albert and Lucille from filing a single joint income tax return for the year 1950, or for any subsequent year if Albert and Lucille do not cause a final decree to be entered. (Cf., *Marriner S. Eccles*, 19 T. C. 1049, affd. 208 F. 2d 796.)⁴⁶ However, under the *Spel-*

⁴⁶It was the *Eccles* case upon which the Tax Court grounded its opinion as to the recognition of local state law relating to marital status.

lens decision, the community property earned by Albert after his Mexican marriage to Bernice belongs one half to Albert, and one half to Bernice. If respondent and the trial court are correct, it would follow therefore, that Albert and Lucille may file a single joint income tax return, including therein, however, but one half of Albert's community earnings⁴⁷ and Bernice is required to file a separate income tax return, reporting the remaining one half of Albert's community earnings. (*Marjorie Hunt*, 22 T. C. 228 (1954).) It is highly unlikely that Congress intended such a result by its enactment of Section 51(b) of the Internal Revenue Code of 1939.

A sounder, as well as more realistic view, is that adopted by respondent in General Counsel Memorandum 25250, Cumulative Bulletin 1947-2, page 32, promulgated within a year before Congress had before it the matter of husband and wife in relation to the joint return. The editor's summary of that memorandum opinion is as follows:

"The taxpayer and his wife, who were domiciled in the State of Connecticut, entered into a separation agreement in January, 1935, which provided for monthly payments to her. She obtained a decree of divorce from a court in Mexico within two weeks thereafter, and the husband then remarried. Payments were made under the 1935 agreement until July of 1943, at which time the wife was advised by counsel that the Mexican divorce would not be recognized by the courts of Connecticut. Under a new agreement which made no mention of the Mexi-

⁴⁷Under *Poe v. Scaborn*, 282 U. S. 101, and *United States v. Malcolm*, 282 U. S. 292, Albert includes only that part of his community earnings which he owns, which, under *Spellens* and California Civil Code Section 161a (Appendix, p. 6) is one half.

can divorce, a lump-sum settlement was made, and the wife thereafter obtained a divorce from a court in Nevada. *Held*, the monthly payments made in 1942 and 1943 are deductible under Section 23(u) of the Internal Revenue Code.”

In the course of the opinion it is said, at page 33:

“Although some State courts refuse to recognize Mexican divorce decrees, it is unlikely⁴⁸ that they would permit parties to deny the validity thereof if the parties have taken steps which indicate their reliance upon the validity of such decrees.”

The opinion further pointed out that the requirement that payments be made pursuant to a separation agreement incident to a divorce or decree of separate maintenance stemmed from

“the apprehension that unless the payments were part of or incident to some publicly recorded action of a court, separation agreements might be used for tax avoidance. Even though a husband and wife might execute a separation agreement as an income-splitting device, it is doubtful that a husband and wife would go through the form of a Mexican divorce for such purpose.”

By the same token, it is suggested that Congress intended to make the joint return between husband and wife available, without regard to the niceties of local law.

That Section 51(b) of the Internal Revenue Code of 1939 is *in pari materia* with Sections 22(k) and 23(u) thereof, referred to in General Counsel Memorandum

⁴⁸In view of the *Spellens* decision, this likelihood becomes a certainty, as to California.

25250 is evident from *Commissioner of Internal Revenue v. Ostler*, 237 F. 2d 501 (C. A. 9, 1956), and Revenue Ruling 57-368, I. R. B. 1957-32, 23. In the *Ostler* case, this Court adverted to Section 51(b)5(B) of the Internal Revenue Code of 1939⁴⁹ which barred a joint return where husband and wife were legally separated under a decree, and determined, for the sake of uniformity in the light of prior decisions, that an interlocutory decree of divorce in California did not bar the filing of a joint return under Section 51(b)(1). On the basis of the *Ostler* decision, the Internal Revenue Service issued Revenue Ruling 57-368, and revoking prior inconsistent ruling, determined that if a California interlocutory decree was not a decree of legal separation barring the parties thereto from the filing of a joint return under Section 51(b)(1), it was likewise not a decree enabling a husband to deduct alimony paid pursuant thereto, under Section 23(u) of the Internal Revenue Code of 1939. General Counsel Memorandum 25250, of course, dealt with, and interpreted the nature of the decree referred to (by reference to Section 22(k) of the Internal Revenue Code of 1939) in said Section 23(u).

Here, in view of the *Spellens*, *Watson* and *Rediker* cases, there can be considerably less doubts as to marital status of Albert and Bernice, than existed under the facts and local law stated in the General Counsel's Memorandum. Yet the decree there was deemed a sufficient decree for income tax purposes because it was highly unlikely that the decree was intended as an income tax sham. It might be said with equal fervor in this case that it is highly unlikely that Albert or Bernice (who

⁴⁹Appendix, pp. 2 and 3.

relied upon the Mexican decree) entered into the state of matrimony for the purpose of obtaining the right to file a joint income tax return.

In view of the foregoing, it is submitted that the opinion and the decision of the Tax Court on this issue is erroneous and should be reversed.

Respectfully submitted,

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APPENDIX.

INTERNAL REVENUE CODE OF 1939

Sec. 22. GROSS INCOME

* * *

(k) Alimony, etc., Income.—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in charge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the extent of such sum payable for such support, shall be considered a payment for such support. Installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument shall not be considered period payments for the purposes of this subsection; except that an installment payment shall be considered a periodic payment for the purposes of this subsection if such principal sum, by the terms of the decree or instrument, may be or is to be paid

within a period ending more than 10 years from the date of such decree or instrument, but only to the extent that such installment payment for the taxable year of the wife (or if more than one such installment payment for such taxable year is received during such taxable year, the aggregate of such installment payments) does not exceed 10 per centum of such principal sum. For the purposes of the preceding sentence, the portion of a payment of the principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be considered an installment payment for the taxable year in which it is received.

INTERNAL REVENUE CODE OF 1939

Sec. 23. DEDUCTIONS FROM GROSS INCOME

* * *

(u) Alimony, etc., Payments.—In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

INTERNAL REVENUE CODE OF 1939

Sec. 51. INDIVIDUAL RETURNS

(a) * * *

(b) Husband and Wife.—

(1) In General.—A husband and wife may make a single return jointly. Such a return may be made even though one of the spouses has neither gross income nor deductions. If a joint return is made the tax shall be

computed on the aggregate income and the liability with respect to the tax shall be joint and several.

* * *

* * *

* * *

(5) Determination of Status.—For the purpose of this section.—

* * *

(B) An individual who is legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.

INTERNAL REVENUE CODE OF 1939

Sec. 1141. COURTS OF REVIEW

(a) JURISDICTION.—The courts of appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in Section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in Section 1254 of Title 28 of the United States Code.

INTERNAL REVENUE CODE OF 1954

Sec. 7482. COURTS OF REVIEW

(a) Jurisdiction.—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts

in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

CIVIL CODE OF CALIFORNIA

Section 83. (WHEN AND BY WHOM ACTIONS MUST BE COMMENCED.)

An action to obtain a decree of nullity of marriage, for causes mentioned in the preceding section, must be commenced within the periods and by the parties, as follows:

One. For causes mentioned in subdivision one: by the party to the marriage who was married under the age of legal consent, within four years after arriving at the age of consent; or by a parent, guardian, or other person having charge of such nonaged male or female, at any time before such married minor has arrived at the age of legal consent.

Two. For causes mentioned in subdivision two: by either party during the life of the other, or by such former husband or wife.

Three. For causes mentioned in subdivision three: by the party injured, or relative or guardian of the party of unsound mind, at any time before the death of either party.

Four. For causes mentioned in subdivision four: by the party injured, within four years after the discovery of the facts constituting the fraud.

Five. For causes mentioned in subdivision five: by the injured party, within four years after the marriage.

Six. For causes mentioned in subdivision six: by the injured party, within four years after the marriage. (Enacted 1872; Am. Code Amdts. 1873-74, p. 188.)

CIVIL CODE OF CALIFORNIA

Section 90. (MARRIAGE, HOW DISSOLVED.)

Marriage is dissolved only:

One—by the death of one of the parties; or,

Two—By the judgment of a court of competent jurisdiction decreeing a divorce of the parties. (Enacted 1872; Am. Code Amdts. 1873-74, p. 189.)

Section 92. (GROUNDS FOR DIVORCE.) Divorces may be granted for any of the following causes:

One. Adultery.

Two. Extreme cruelty.

Three. Wilful desertion.

Four. Wilful neglect.

Five. Habitual intemperance.

Six. Conviction of a felony.

Seven. Incurable insanity.

CIVIL CODE OF CALIFORNIA

Section 137. (ACTION FOR PERMANENT SUPPORT AND MAINTENANCE WITHOUT APPLYING FOR DIVORCE.)

When the husband or wife has any cause of action for divorce as provided in this code, or the husband or wife wilfully deserts the wife or husband, or when the husband or wife wilfully fails to provide for the wife or husband, he or she, as the case may be, may, without applying for a divorce, maintain in the superior court an action against her or him, as the case may be, for the permanent support and maintenance of herself or himself, and may include therein at her or his discretion an action for support, maintenance and education of the children of said marriage during their minority. Such action shall be known as an action for separate maintenance.

Section 161a. (INTERESTS IN COMMUNITY PROPERTY.)
The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in the community property.

EXCERPTS FROM TESTIMONY OF CAMILLE A. GARNIER
[R. pp. 227, 229, 230, 231, 237, 238]

[R. p. 227]:

Q. (By Mr. Constable): Have you ever personally bought one of these contracts? A. Yes, sir.

* * *

[R. p. 229]:

Q. I think you testified that you could not predict the amount of refunds to be obtained on a water deposit contract? A. Yes sir. It is very difficult to predict it with any certainty.

Q. But it can be predicted? A. Yes, within bounds, yes, sir.

Q. And on the basis of that *prediction*, you bought some contracts? A. I *bought a contract*.

Q. *A contract*? A. Yes, sir.

* * *

Q. (By Mr. Shearer): Did you buy that contract personally? A. Yes, sir.

Q. Was the subdivision to which it related fully completed when you bought it? A. Well, the houses had been installed and fully occupied for a period of about four years.

Q. Where was this property? A. West Covina.

Q. How much did you pay for that contract? A. I think we paid about \$8,400⁵⁰ [sic.] for a \$6,800 contract.

* * *

[R. p. 230]:

Q. (By Mr. Constable): Mr. Garnier, you have purchased contracts or a contract, you say, personally; then you said "we". Now, whom were you referring to?

A. Well, I am speaking for my sister and myself, who is in business with me.

Q. Now, Mr. Garnier, in addition to purchasing some of these contracts personally, you have, have you not, through companies in which you have a financial interest purchased some of these similar contracts?

Mr. Shearer: Again I am going to object on the ground that this is improper cross examination.

The Court: The objection is overruled.

The Witness: Would you repeat the question?

(Question read.) A. Yes.

Mr. Constable: That is all, your Honor.

Mr. Shearer: I would like to examine further on the new matter raised by counsel.

The Court: Well, I don't know whether there is any new matter that has been raised, but if you have some questions, you may ask because he is your witness:

[R. p. 231]:

Q. (By Mr. Shearer): What companies purchased these contracts? A. Well, it is a little difficult to answer that question so that it would be properly interpreted. It would be necessary for me to make a statement prior to that, if that is agreeable, because the purchase of the con-

⁵⁰The actual testimony was \$840, but the reporter's transcript erroneously transcribed it at \$8400. A request by petitioners for a stipulation to correct the record is pending and failing that a motion so to do will be brought.

tract within our company, which has been very limited, is for a purpose—not a basis—utterly different than was ever available to Mr. Gersten.

Mr. Constable: I object. I move that this be stricken.

The Court: Well, I think if you can answer the question, then if there is any explanation called for, why, it may be asked.

(Question read.)

The Court: Let the record show that he is asking what company.

A. I think Garnier Construction Company purchased a contract.

Q. That is in addition to the contract to which you referred when you spoke of a purchase by yourself and your sister? A. That is correct.

Q. Now, when did Garnier Construction Company purchase this contract? A. I wouldn't know. It would be in the *last two years probably*.

* * *

[R. pp. 237, 238]:

By The Court: In other words, where that exists, your experience would be that—your study—they had gotten back in the period 25 percent? A. Of the full deposit by the end of the tenth year.

Q. All right. Now, contrast that situation with one that is fully built and sales are what might be regarded as normal, namely, the sales of the houses to purchasers. A. In the case of a subdivider that is going to build the houses at the same time that the mains are installed, the amount of money that would be returned of the total deposit would depend a great deal on the time that that installation was made, and as an average—again I am speaking as an average over let's say 10,000 services have been installed by our company in the last two or three

years, which may not be applicable to this case, which was way prior, and where costs were different and everything else—the refund will be anywhere from 65 percent to about 105, with an average of about 70 to 80, approximately very close with what Mr. Moseley said.

EXCERPTS FROM TESTIMONY OF M. E. MOSELEY

[R. pp. 187, 188, 200, 201 and 202]:

[R. p. 187]:

Q. (By Mr. Shearer): Mr. Moseley, speaking of a period of time after June, 1949, and not later than December 31, 1950, do you know of any sales of rights to receive refunds under contracts similar to Exhibits 1 through 7 which were issued by your company? A. I know of some sales, *but I can't pin them down as to the time at this moment.*

Q. Do you know approximately how many sales were made, that is, that you know of? A. I know of, I believe, *four contracts that have been sold.*

Q. Now, did those relate to subdivisions which had been completely occupied, that is, were completed as far as subdivision was concerned?

The Court: Which do you mean, occupied or completed?

Q. (By Mr. Shearer): Did those refer to subdivisions in respect of which the homes had been completely or substantially completely built? A. *Three of them were substantially or completely built and one was not.*

Q. Can you tell us approximately how many such contracts were then existing *in that period to which I have referred?* A. I don't know that these were sold during that period. *They may have been sold more recently than that.*

Q. My question was directed to the period. A. I told you that I knew of the sale of four contracts, but I couldn't tell you *as to the time*, whether they were sold during that period or not; I can't tell.

* * *

[R. p. 200]:

Q. (By Mr. Constable): Now, thinking back to, oh, during the period 1949 to 1950, barring the possibilities of depressions and floods and earthquakes and droughts, and ignoring the occupancy question, isn't it a conservative estimate to say that at least 70 percent of the refunds will be made on the contracts which San Gabriel Water Company has with subdividers?

[R. p. 201]:

* * *

Mr. Constable: I believe I said, "Is it not a conservative estimate that 70 percent of the refunds would be made under the contracts which San Gabriel had with its builders?" A. I believe it would be.

* * *

Q. (By Mr. Shearer): Mr. Moseley, is your 70 percent an average figure? A. No. Oh, I beg your pardon.

Q. The 70 percent answer you gave to the last question, are you giving that as an average figure? A. That would be what it would amount to, I'd say.

Q. Do you believe that there will be some which will pay off less than 70 percent? A. You mean at this time or in 1950?

Q. Speaking as of 1950, with respect to the contract you then had, and having in mind the various factors you took into account— A. Yes, some would pay off much less than 70 percent.

[R. p. 202]:

Q. *Some would pay off at more than 70 percent?*

A. *Yes, sir.* (Emphasis added.)

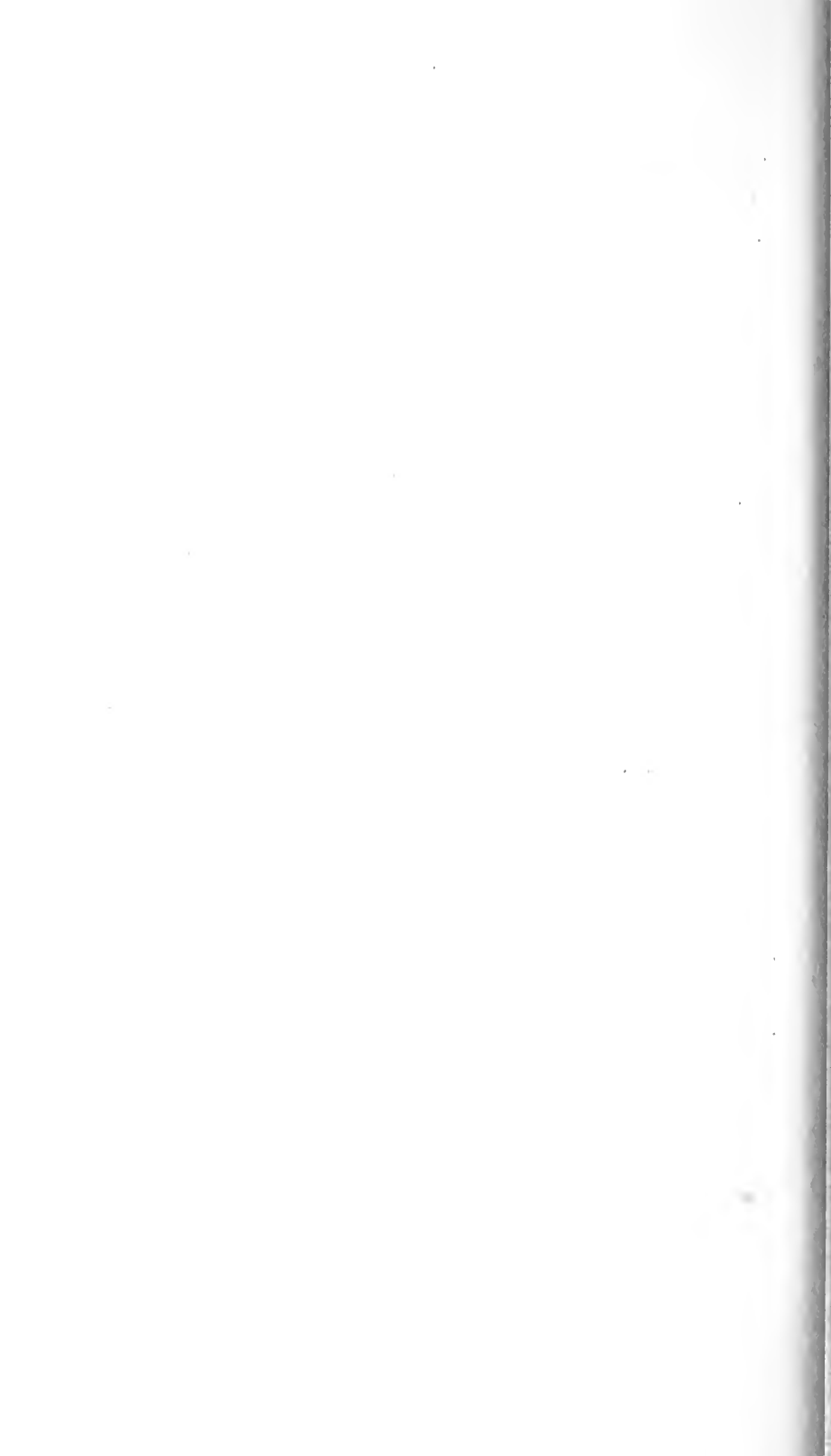
CIVIL CODE OF CALIFORNIA

Section 61. (SUBSEQUENT MARRIAGES VOID: EXCEPTIONS: INTERVAL FOLLOWING DIVORCE: MARRIAGE VALID UNTIL ANNULLED WHERE FORMER SPOUSE ABSENT.)

A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless:

1. The former marriage has been annulled or dissolved. In no case can a marriage of either of the parties during the life of the other, be valid in this state, if contracted within one year after the entry of an interlocutory decree in a proceeding for divorce.

2. Unless such former husband or wife is absent, and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or is generally reputed or believed by such person to be dead at the time such subsequent marriage was contracted. In either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal.



**In the United States Court of Appeals
for the Ninth Circuit**

**ALBERT GERSTEN, MYRON P. BECK AND ANN H.
BECK, MILTON GERSTEN AND MARY GERSTEN,
PETITIONERS**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petitions for Review of the Decisions of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15945

ALBERT GERSTEN, MYRON P. BECK AND ANN H.
BECK, MILTON GERSTEN AND MARY GERSTEN,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petitions for Review of the Decisions of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Tax Court (R. 61-94) is reported at 28 T.C. 756.

JURISDICTION

These appeals involve income tax for the year 1950 and are taken by five individual taxpayers from three decisions by the Tax Court entered on October 30, 1957. (R. 95-97.) Each decision was entered in a separate proceeding but the three proceedings as

well as several others not involved here, were consolidated for hearing by the Tax Court. (R. 61-62.) The taxpayers received notices of deficiencies dated August 24, 1953, and within ninety days thereafter filed petitions for redetermination of such deficiencies with the Tax Court pursuant to Section 272(a) of the Internal Revenue Code of 1939. (R. 7-19, 27-39, 47-54.) Shortly thereafter answers thereto were filed for the Commissioner (R. 25-27, 45-47, 59-61) and, after hearing, the Tax Court rendered its decisions (R. 95-97). Then within three months, i.e., on January 24, 1958, three petitions for review were filed by the taxpayers. (R. 98-104.) Jurisdiction of this Court is invoked under Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Rights under contracts with the San Gabriel Valley Water Company were assigned and distributed to the taxpayers upon the dissolution and liquidation in 1950 of certain corporations of which they were stockholders. The question is whether the Tax Court correctly held that the contracts had a fair market value when distributed and, if so, whether each taxpayer must report on his 1950 return his share of the fair market value of the contracts as part of the capital gain realized from the liquidation of the corporations.

2. Whether the taxpayer Albert Gersten and his alleged second wife were entitled to file a joint return for 1950 as husband and wife under Section 51(b) of the Internal Revenue Code of 1939.

STATUTES AND RULING INVOLVED

The pertinent provisions of the statutes and ruling appear in the Appendix, *infra*.

STATEMENT

The facts so far as pertinent to the two issues ¹ involved in this appeal and as found by the Tax Court are as follows (R. 68-80):

The individual taxpayers ² involved here kept their books and reported their income on a cash basis. (R. 69.)

Facts Relative To The First Issue On Appeal

From July, 1947, until the end of 1950 taxpayers Albert Gersten and Myron P. Beck were the controlling stockholders of the four corporations involved herein [i.e., J. Richard Company, Rex Land Company, Whittier Development Company, and Lawrence Land Company]. Milton Gersten also held stock in the last two companies. These corporations were engaged in the business of subdividing tracts of land, constructing houses thereon, and selling such houses. (R. 69.)

¹ The first issue before the Tax Court was decided for the taxpayers (R. 80-82) and was not appealed by the Government. The other four issues were decided for the Government but the taxpayers have not included the third and fifth issues in their appeal. (R. 84-87, 91-94.)

² Ann H. Beck and Mary Gersten are involved in these appeals solely because they filed joint income returns with their husbands, Myron P. Beck and Milton Gersten, respectively. Consequently, in discussing the activities of the taxpayers here, we shall be referring to the other three taxpayers.

The extension of pipelines for water service was essential to the subdivision of the tracts and the sale of the houses constructed thereon. In order to provide water facilities for the subdivisions, contracts were entered into with the San Gabriel Valley Water Company, which agreed to extend its waterlines into the subdivisions upon payment by the subdividing corporations of the cost of such extensions. San Gabriel was a California water utility corporation, subject to the jurisdiction of the Public Utilities Commission of the State of California, and held a franchise to operate in the area in which the tracts in question were located. Its minimum rate for water during 1948, 1949, and 1950 was \$1.25 per month. (R. 69.)

Under the contracts, San Gabriel was to make payments to the subdividing corporations on the basis of its gross receipts from the sale of water to homes in the particular subdivision. These payments were to be made for a period of ten years from the date the lines were completed, unless the full amount should be paid prior to the end of such ten-year period. Thus it was possible that a subdividing corporation might not receive repayment in full. The corporations did not hold title to the facilities. (R. 70.)

The four corporations were all dissolved by December 31, 1950. Substantial amounts of their payments to San Gabriel remained unpaid at the time of their dissolution, and such contracts, which were fully transferable, were assigned to their stockholders along with all of the other corporate assets. (R. 70)

Contracts similar to those here have been bought and sold. Under normal conditions, a return of ap-

proximately 70 per cent of the original payment might be expected on such contracts. Some of the conditions which affected the amount which might be refunded were: (1) the time in which all houses within a subdivision were completed; (2) the time within which the houses, once completed, were sold and occupied; and (3) the amount of water the consumers used, which in turn was dependent on such factors as the number of water-consuming appliances owned by them, weather conditions during the year, and the amount of plantings and vegetation needing irrigation. (R. 70.)

Upon the dissolution of the corporations, Albert Gersten, Myron P. Beck, and Milton Gersten did not assign any value to their respective interests in the water contracts in arriving at the gain they realized upon liquidation of the corporations. The Commissioner determined that each of the contracts did have a fair market value when they were received by the stockholders in liquidation, and on the basis thereof increased the amount of capital gain realized in his determination of deficiencies herein. (R. 71.)

Details of the contract which each corporation entered into with San Gabriel, and the manner in which such contracts were treated for tax purposes by the transferees of the corporate assets, were as follows:

(1) The J. Richard Company, hereinafter referred to as Richard, was a California corporation, incorporated on July 10, 1947, and dissolved about June 22, 1950. Richard's stock was owned equally by Albert Gersten and Myron P. Beck. During the course of its existence, Richard acquired three tracts

of land which it subdivided into lots on which it constructed and sold houses. On December 3, 1947, a contract was made with San Gabriel providing for the installation of waterlines on two of the tracts. San Gabriel completed the installation of these waterlines on April 2, 1948. The contract required Richard to pay San Gabriel \$23,764, and San Gabriel agreed to repay such payment "in the amount of $\frac{1}{3}$ of the gross revenues derived from sale of water to occupants of said subdivisions for a period not to exceed 10 years from date hereof." (R. 71-72.)

On December 2, 1948, a similar contract was made with San Gabriel to provide water facilities for the third tract. The second contract required a payment of \$15,258, and San Gabriel agreed to repay such payment in the amount of one-third of the gross revenue derived from the sale of water for a period not exceeding ten years from the date of the contract. (R. 72.)

At the time of Richard's dissolution, on June 22, 1950, San Gabriel had repaid \$2,325.37 on the first contract covering the first two tracts, and \$1,277.69 on the second contract covering the third tract. All of the houses constructed by Richard on the first two tracts were sold by June 1, 1949, and all of the houses constructed by it on the third tract were sold by February 3, 1950. (R. 72.)

Upon the dissolution of Richard on June 22, 1950, Albert Gersten and Myron P. Beck were each paid cash in the amount of \$38,202.12, and received a 50 per cent interest in the contracts with San Gabriel. They did not assign any value to the interest received

in such contracts in computing the amount of capital gain realized on the dissolution of Richard. But the Commissioner determined that such contracts had a fair market value of 50 per cent of the amount which remained unpaid on June 22, 1950, or \$17,709.48. Accordingly he increased the amount of capital gain realized by Gersten and Beck on Richard's distribution of its assets to them. The contracts had a fair market value at the time of Richard's dissolution, equal, at least, to the amount determined by the Commissioner. (R. 73.)

(2) The Whittier Development Company, hereinafter referred to as Whittier, was a California corporation, incorporated on August 20, 1948, and dissolved on or about December 28, 1950. From February 28, 1950, to December 28, 1950, Albert Gersten and Myron P. Beck each owned 40 per cent of its stock and 20 per cent was owned by Milton Gersten. During its existence, Whittier acquired two parcels of land which it subdivided into lots and constructed houses thereon for sale. In order to provide water facilities for such tracts, it entered into two contracts with San Gabriel. In the first Whittier agreed to and did pay, on or about November 29, 1949, \$23,841 to San Gabriel, and San Gabriel agreed to repay such payment within ten years from the date of the contract by payment of 35 per cent of the annual gross revenues derived from the sale of water. A few months later Whittier made a second contract with San Gabriel providing for the installation of water facilities to the other tract which it owned and under which it paid San Gabriel \$5,214, and San

Gabriel agreed to repay such sum within a ten-year period from completion of the installation of the facilities, which was completed on April 14, 1950. Such repayment was to be made from 35 per cent of the gross revenues derived from the sale of water. By December 28, 1950, San Gabriel had repaid \$1,413.02 on the first contract and \$62.98 on the second. Whittier had sold all houses on the first tract by June 7, 1950, and on the second tract by December 15, 1950. (R. 73-74.)

Upon the dissolution of Whittier on December 28, 1950, Albert Gersten and Myron P. Beck each received the sum of \$77,160.26 and a 40 per cent interest in each of Whittier's contracts with San Gabriel. Milton Gersten received the sum of \$38,580.13 and a 20 per cent interest in such contracts. None assigned any value to the interest received in these contracts in computing the amount of capital gain realized on the dissolution of Whittier. The Commissioner determined that such contracts had a fair market value of 50 per cent of the amount which remained unpaid on December 28, 1950, or \$14,545.50. Accordingly he increased the amount of capital gain realized on Whittier's distribution of its assets to them. Such contracts had a fair market value at the time of Whittier's dissolution, equal, at least, to the amount determined by the Commissioner. (R. 75.)

(3) The Rex Land Company, hereinafter referred to as Rex, was a California corporation, incorporated on February 4, 1949, and dissolved on or about October 25, 1950. Its stock was equally owned by Al-

bert Gersten and Myron P. Beck. Rex acquired a tract of land which it subdivided into lots and on which it constructed and sold houses. On February 9, 1949, it entered into a contract with San Gabriel for the installation of waterlines to the tract. For the installation of such facilities, Rex agreed to and did pay to San Gabriel the sum \$14,707.20, San Gabriel agreed to repay such payment within a ten-year period from the date on which installation of the facilities was completed, which was April 22, 1949. Such repayment was to be made from 35 per cent of the gross revenues derived by it from the sale of water. By October 25, 1950, San Gabriel had repaid \$949.02 of such sum. All of the houses constructed on the tract were sold by March 16, 1950. (R. 75-76.)

Upon the dissolution of Rex on October 25, 1950, Albert Gersten and Myron P. Beck each received the sum of \$1,158.84 in cash, a 50 per cent interest in certain real property having a fair market value of \$215,350, and a 50 per cent interest in Rex's contract with San Gabriel. Neither assigned any value to the interest received in such contract in computing the amount of capital gain realized on the dissolution of Rex. But the Commissioner determined that the contract had a fair market value of 50 per cent of the amount which remained unpaid on October 25, 1950, or \$7,132.68, and accordingly increased the amount of capital gain realized by them on Rex's dissolution. The contract had a fair market value at the time of Rex's dissolution equal, at least, to the amount determined by the Commissioner. (R. 76-77.)

(4) The Lawrence Land Company, hereinafter referred to as Lawrence, was a California corporation, incorporated on March 25, 1949, and dissolved on or about December 31, 1950. The stock of the corporation was owned by Albert Gersten, Myron P. Beck and Milton Gersten. Lawrence acquired a parcel of land which it subdivided into lots and constructed houses thereon. On January 26, 1950, it entered into a contract with San Gabriel for the installation of waterlines to the tract. Such contract was modified by a subsequent contract entered into on February 14, 1950. Under the contract, as modified, Lawrence agreed to and did pay to San Gabriel \$31,021 and San Gabriel agreed to repay such sum within a ten-year period from the date on which installation of the facilities was completed, which was March 29, 1950. Such repayment was to be made from 35 per cent of the gross revenue received from the sale of water to consumers. All of the houses which Lawrence constructed on the tract were completed and sold by December 11, 1950. No repayments were paid by San Gabriel to Lawrence prior to Lawrence's dissolution on December 31, 1950; but payments commenced to be made on March 1, 1951. (R. 77-78.)

On December 31, 1950, Lawrence distributed its assets which included in addition to cash and certain real estate its contract with San Gabriel. The interest of Albert Gersten in such contract was 40 per cent, the interest of Myron P. Beck was 50 per cent and that of Milton Gersten was 10 per cent. They did not assign any value to the interest received in such contract in computing the amount of capital

gain realized on the dissolution of Lawrence but the Commissioner determined that the contract had a fair market value of \$15,301.96 on December 31, 1950. Accordingly he increased the amount of capital gain realized by them on Lawrence's distribution of its assets to them. Lawrence's contract with San Gabriel had a fair market value at the time of its dissolution, equal, at least, to the amount determined by the Commissioner. (R. 78-79.)

Facts Relating To The Second Issue On Appeal

On April 3, 1950, Mrs. Lucille Gersten obtained an interlocutory decree of divorce from Albert Gersten in an action filed in the Superior Court of the State of California in and for the County of Los Angeles. Then on November 2, 1950, the latter obtained a final decree of divorce from Lucille Gersten in the First Civil Court of the State of Chihuahua of the Republic of Mexico, sitting at Juarez. On the same date he married Bernice Anne Gersten in Juarez. The California interlocutory decree was not final on the date of the Mexican divorce and marriage. At all times during the year 1950, Albert Gersten and Bernice Anne Gersten were residents and domiciliaries of the State of California. (R. 80.)

The Commissioner determined that Albert Gersten was not legally married to Bernice and that they were not entitled to file a joint return as husband and wife as permitted by Section 51(b) of the 1939 Code. The Tax Court concluded that the Commissioner's determination was correct. (R. 87, 90-91.)

SUMMARY OF ARGUMENT

1. During the taxable year 1950, the corporations involved here were dissolved and their assets were distributed as liquidating dividends to the stockholders who are taxpayers here. Among such assets were certain contracts under which the corporations advanced the San Gabriel Valley Water Company the cost of water installations on the tracts which the corporations were subdividing and San Gabriel agreed to repay a named percentage of their gross revenues for a designated period. The Tax Court held that the San Gabriel contracts had a fair market value when the corporations were dissolved and that the taxpayers must report their respective shares of such contracts in the year when the liquidation occurred.

The Tax Court's decision is in accord with the statutory provisions stating that amounts distributed in liquidation are to be treated as in full payment for the corporate stock and that such amounts must be taxed in the year received to the extent of the "amount realized" which means cash plus the fair market value of any property (other than money) received.

It is well established that the question of whether property (such as the San Gabriel water contracts) had a fair market value is one of fact. Therefore this issue resolves itself into a determination of whether the evidence supports the Tax Court's ultimate conclusion, namely, that the Commissioner correctly determined that the fair market value of these contracts was fifty per cent of the amounts of the original outlay still unpaid at the time of liquidation. The Com-

missioner's determination is of course presumptively correct and the taxpayers had the burden of disproving its correctness but they made no attempt to do so. However, the evidence shows that the contracts all had from seven to ten years to run when the liquidation occurred, that there were a large number of householders in the area involved who would have to be customers of San Gabriel, and that the taxpayers could expect a fair amount of revenue from the contracts regularly. The evidence also shows that these contracts were transferable and that similar contracts had been bought and sold. We submit that the Tax Court's decision on this issue is correct.

2. Taxpayer Albert Gersten secured a divorce in Mexico in 1950 and was married there the same day. This occurred some months before the final divorce decree was entered in the suit which had been filed against him by his first wife in California. Notwithstanding the pendency of the California divorce suit Albert and his alleged second wife filed a joint tax return for the year 1950, but the Commissioner refused to accept it on the ground that the privilege of filing joint returns has been granted only to those persons who are "husband and wife" and that these persons were not legally married under California law. This determination was approved by the Tax Court and is in accord with decisions of this Court and also gives the correct interpretation of California law as set forth in specific statutory provisions and in many California decisions.

ARGUMENT

I

The Tax Court Correctly Held That The San Gabriel Contracts Which Were Included In The Liquidating Dividends Of The Dissolved Corporations Involved Here Had A Fair Market Value At The Time Of Liquidation And That The Stockholders-Taxpayers Should Report Their Respective Shares Of Such Contracts In The Year That The Liquidation Occurred

Taxpayers Albert Gersten and Myron P. Beck were the controlling stockholders in the four corporations involved here, and taxpayer Milton Gersten also had stock in two of these corporations. (R. 69.) All of these corporations were dissolved by the end of 1950, the taxable year, and their assets were also distributed in that year as liquidating dividends to their stockholders. Among such assets were the contracts which were made by the corporations with the San Gabriel Valley Water Company in order to get water installed on the tracts of land that they had acquired for subdivision and sale.³ The treatment of these contracts constitutes the first issue here. As stated by the taxpayers (Br. 4-5) the question is whether the contracts had an ascertainable fair market value when the liquidation occurred and, if so, whether the taxpayers' respective shares of such contracts should be reported on their tax returns for 1950 when the distribution

³ All of the corporations also distributed cash and two of them distributed some land which the parties stipulated had a fair market value. (R. 109, 111, 114, 116-117.) The taxpayers have raised no objection to paying income tax on the cash or land in the year when the distributions were made to them.

was made. It is our position that both parts of that question must be answered in the affirmative and that was the substance of the Tax Court's decision. But we also wish to point out that in stating this issue, the Tax Court limited it to whether the contracts had a fair market value when the liquidation occurred. (R. 82.) The Tax Court's statement is, of course, correct for, as we shall point out, if property received upon a liquidation has a fair market value, a taxpayer may not legally postpone the reporting of any gain from the receipt of such property to a later year.

A. Applicable statutory provisions

Section 115(c) of the Internal Revenue Code of 1939 (Appendix, *infra*) provides that amounts distributed in liquidation of a corporation shall be treated as in full payment in exchange for the stock, and that the gain or loss to the distributee shall be determined under Code Section 111, but shall be recognized only to the extent indicated in Code Section 112. Section 111(a) provides that gain from a sale or other disposition of property shall be the excess of the amount realized over the adjusted basis (which in this case would be cost) and Section 111(b) defines the term "amount realized" as being "the sum of any money received plus the fair market value of the property (other than money) received." (Appendix, *infra*.)

Thus, as indicated above, to determine how much of the amount realized is taxable we must turn to Section 112(a). (Appendix, *infra*.) That section sets forth the general rule as follows: *Upon a sale or ex-*

change, the entire amount of the gain or loss, as determined under section 111, shall be recognized. Several exceptions to this rule are listed but none are applicable here. Obviously in view of these clearly worded statutory provisions the taxpayers here were required to report for income tax purposes not only the cash received upon the liquidation of their corporations but also the receipt of any other property (such as the San Gabriel contracts) if such property had a fair market value when the exchange (i.e., liquidation) occurred.⁴ In other words, as we have already indicated, this issue is really one of determining whether the contracts here had a fair market value when distributed and such a question has been repeatedly held to be a question of fact. Consequently it is our position that after the above statutory provisions are applied, the issue here is to be determined by the facts, and that the facts support the Tax Court's decision.

B. Findings of fact which support the Tax Court's decision

Before discussing the facts here, we wish to point out that the Commissioner determined that at the time of the liquidation all of the San Gabriel contracts had a fair market value of fifty per cent of the amounts remaining unpaid. For example, the J. Richard Company paid out \$39,022 originally to San Gabriel for water installations and at the time of its dissolution

⁴ While the taxpayers are required to report the entire amount of gain realized by them upon the liquidation of the corporations here, such gain can be treated as capital gain but, as Commissioner has done so, we do not discuss the statutory provisions relative to capital gain.

San Gabriel had repaid \$3,603.06. Thus the balance remaining to be paid on its contracts (if the full outlay should be recovered) was \$35,418.94 but the Commissioner determined that the fair market value of such contracts at the time of liquidation was only fifty per cent of the latter figure or \$17,709.48. (R. 73.) As to the figures for the other corporations see R. 72-78.

The Commissioner's determination was presumptively correct. That is, of course, too well established to require citation of authority. It is equally well established that the burden of proving the incorrectness of the Commissioner's determination was on the taxpayers but they have not met their burden. Indeed, as the record shows, they made no attempt at the trial to overturn the Commissioner's determination.⁵ But the Tax Court found that each of the San Gabriel contracts had a fair market value at the time of the liquidation equal at least to that determined by the Commissioner. (R. 73, 75, 77, 79.) In regard to this finding the Tax Court said (R. 83-84):

The evidence shows that each of the contracts did have a fair market value at the time the corporations were dissolved, and we have so found.

⁵ At the hearing, counsel for taxpayers admitted that if the Tax Court held certain cases relied on by taxpayers to be inapplicable (as it did) they would then be in the position of not having met their burden in connection with the presumption of correctness attaching to the Commissioner's determination. Counsel also admitted that taxpayers did not intend to put on any proof relative to the value of the contracts which were distributed at the time of liquidation. (R. 153.)

None of the contracts were as much as three years old at the time of distribution, and the payments under them had commenced on all except the Lawrence contract. They began on that one shortly thereafter. All houses had been completed and sold by the time each corporation dissolved. Expert witnesses testified that contracts, similar to those here, were bought and sold, and that one might expect to receive as much as 70 per cent of the total original payment of such similar contracts. There was testimony to the effect that a proposed freeway would cross the subdivision developed by Lawrence. No showing, however, was made that the plans for the freeway route were final, or, if adopted, the extent to which the occupancy of the houses within the area would be affected during the repayment period. Neither was there any showing that petitioners would or would not have a claim for compensation, if and when their rights to repayment might be destroyed as a result of the building of the freeway.

The record, in our opinion, amply sustains the respondent in his determination of fair market value, and we have so found in our findings of fact.

As counsel for taxpayers refers (Br. 20-23) to some of the statements of the Tax Court as erroneous inferences and criticises its ultimate conclusion as not well founded, we will now analyze the stipulation of facts and testimony which support the Tax Court's conclusion.

There were six San Gabriel contracts distributed by the dissolved corporations in 1950. One of these was three years old and so would expire near the end of

1957. Another expires on December 2, 1958, two others will expire in the spring of 1959, and two in the spring of 1960. (R. 107-108, 110, 113, 116.)⁶ It was proper for the Tax Court to refer to the expiration dates for it is important that these contracts had periods of from seven to ten years to run at the time of liquidation. Certainly it can not be denied that in the length of time the contracts would be in effect considerable amounts could be expected as payments under the contracts.

There were of course some contingencies such as variations in weather, and these, as taxpayers contend, could make some difference in the use of water for watering plants and yards. But a very large part of the water used by householders is for drinking, bathing, laundering, cooking and other purposes within a house. Thus, as the latter uses are affected very little, if any, by changes in weather, they always furnish a fairly constant basis for revenue from the sale of water. But exterior uses of water can not be dismissed as inconsiderable. Regardless of what the weather may be, it is well known that in Southern California, where the homes here are located, all plants and lawns live and grow throughout the year and need a great deal of water. It is also a matter of common knowledge that in a nice residential section, as we may assume the area here to be, home owners take a great deal of pride in their premises and beautify them with many flowers and trees. Thus exterior uses

⁶ The stipulation gives the contract with the Rex Land Company as expiring April 22, 1949, but obviously that is a mistake. It should be 1959. (R. 74, 113.)

of water are also the basis for a considerable and fairly regular source of revenue from water sales.

We do not of course know how many people would be using water under contracts here, but we do know that the four corporations subdivided their tracts of land into 1078 lots and on 1065 of these that number of homes had been built and sold before their dissolution in 1950. (R. 105-106, 109-110, 112, 115.) Presumably most, if not all of these 1065 homes were occupied soon after they were sold, and it is reasonable to assume that most of them would continue to be occupied throughout the periods covered by the contracts here. At any rate, Mr. Moseley, vice president of San Gabriel, testified, that there was comparatively full occupancy from 1947 through 1950 in the area in which the tracts involved here are located, and that such condition continued thereafter. (R. 215-216.) Mr. Moseley's testimony was substantiated by the stipulation (R. 120) that during the years 1948, 1949 and 1950 there were substantially no vacant houses in the area involved here.

It was also stipulated that San Gabriel held a franchise for furnishing water in the area. (R. 120.) That of course means that San Gabriel was the only company which could sell water therein. Consequently, as water is one of the necessities of life and is used for many purposes, and as it is extremely unlikely that any one living in the area had a private source of water such as a well or cistern, it is evident that San Gabriel has had a regular and considerable amount of revenue from the 1065 homes sold by the dissolved corporations. It is also evident that since

San Gabriel was unconditionally obligated to pay over either one third or thirty-five per cent of its gross revenue from the area covered by contracts (R. 72-77), the taxpayers, as assignees of the contracts, could expect payments regularly from San Gabriel for the periods of the contracts. Even those customers of San Gabriel who might have used very little or no water have been required to pay a minimum rate, which in the years 1948 through 1950 was \$1.25 per month. (R. 121.)

We submit that the above facts not only show that the San Gabriel contracts could be counted on as a regular source of income for the taxpayers but also indicate that the factors determining the amount of water bought from San Gabriel is sufficiently constant to furnish a reasonable basis for computing the fair market value of the contracts at the time of liquidation. There is also other evidence to support our statement. The parties here stipulated that the water contracts were transferable (R. 120), and Mr. Moseley (who counsel for taxpayers stated had been qualified as an expert (R. 191)) testified that he knew of four sales of contracts similar to those here (R. 177, 187-188). He also stated that it would be a conservative estimate to say that seventy per cent of the original outlay under these contracts would be repaid by his company. Then upon cross-examination he explained this further by stating that seventy per cent would be an average return on such contracts as some would pay off much less and some would pay off more. (R. 201-202.)

Mr. Mosely's testimony was substantiated by that of Camille A. Garnier, president and general manager of Suburban Water Systems, a private company similar to San Gabriel. (R. 218.) The latter testified that while it was difficult to predict the amount of refund which might be made on water deposit contracts like those here, such amount could be predicted. (R. 229.) He explained that when subdividers sold lots and the purchasers did not build residences on them for some years, the refunds to the subdividers might be as low as twenty to twenty-five per cent of the original outlay. But, upon being asked to contrast that situation with an area in which the houses have been built and sold promptly (as was true in this case), Mr. Garnier replied (R. 237-238):

In the case of a subdivider that is going to build the houses at the same time that the mains are installed, the amount of money that would be returned of the total deposit would depend a great deal on the time that that installation was made, and as an average—again I am speaking as an average over let's say 10,000 services have been installed by our company in the last two or three years, which may not be applicable to this case, which was way prior, and where costs were different and everything else—*the refund will be anywhere from 65 percent to about 105, with an average of about 70 to 80, approximately very close with what Mr. Mosely said.* (Italics supplied.)

Mr. Garnier was asked how one could get a refund of 105 per cent and he stated that that was the way he construed a contract on which payments in full

had been made in about eight and a half years. He then reiterated that the demand for homes and the rate at which homes were selling were big factors in computing the amount of the repayments under such contracts. (R. 238-239.) Thus the witness clearly indicated that, when homes are built and sold promptly as in this case, the situation is very favorable for a large percentage of the original outlay to be repaid.

Mr. Garnier testified further that he and his sister had bought a water contract similar to those here, and that the Garnier Construction Company had also purchased such a contract. (R. 229-230.) Thus he substantiated the testimony of Mr. Mosely that contracts like those here not only can be bought and sold but that such sales have been made. Obviously such testimony by two experts in the field of water installations not only establishes the fact that contracts like the ones here do have an ascertainable fair market value but their testimony as to the average return which may be expected also shows that the Commissioner's determination of such value, being only fifty per cent of the unpaid balance, was a very reasonable one. Consequently the Tax Court was warranted in accepting the Commissioner's determination, particularly in the absence of any proof by the taxpayers indicating that such determination is incorrect.

C. The cases on which taxpayers rely do not support their contention

While taxpayers apparently admit, as they must, that the San Gabriel contracts had substantial value they contend that the contracts had no ascertainable

fair market value at the time that the corporations were dissolved. In support of such contention the taxpayers rely primarily on *Burnet v. Logan*, 283 U.S. 404; *Westover v. Smith*, 173 F. 2d 90 (C.A. 9th), and *Commissioner v. Carter*, 170 F. 2d 911 (C.A. 2d). In the *Logan* case, there was a sale of the stock of the Andrews and Hitchcock Company by the taxpayer therein and all of that company's other stockholders. The consideration was a named amount of cash plus a contractual right given by the purchaser to pay the sellers 60 cents a ton for any iron ore allotted to the purchaser as assignee under a prior agreement whereby the Mahoning Company (a producing company whose stock had been partly owned by Andrews and Hitchcock) promised to apportion any ore it extracted among its stockholders. But the lease under which the Mahoning company operated did not require it to produce either a maximum or minimum tonnage of ore or to make any definite payments. In discussing the consideration for the taxpayer's sale of stock, the Supreme Court said (p. 413) that she had received cash and "a promise of future money payments wholly contingent upon facts and circumstances not possible to foretell with anything like fair certainty." Therefore it held that the promise to the taxpayer had no ascertainable fair market value and that the taxpayer, who had not recovered her capital investment prior to the taxable year, could properly demand the return of her capital before assessment of any taxable profit based on payments only conditionally promised.

Obviously the contingencies surrounding the prom-

ise in the *Logan* case differ materially from the facts here. As we have pointed out, the circumstances in this case were such that San Gabriel could always count on selling water to most, if not all, of the occupants of the 1065 homes involved here and, of course, San Gabriel had to be ready to sell water at all times for that was necessary in order to keep its franchise. Thus San Gabriel was assured, without any contracts with the home owners, that it would have gross income regularly from sales to such persons. Therefore despite some variations in revenue due to seasonal changes and other causes, San Gabriel could expect a fairly constant amount of gross income annually and, because it could, the fair market value of the taxpayers' contractual rights could be properly determined. Moreover, there is also evidence here that similar contract rights had been sold by other persons, and there was no similar evidence in the *Logan* case.

Westover v. Smith, supra, is also distinguishable on its facts. There the taxpayer received, as a stockholder, upon a corporate liquidation in 1940, cash and the right to receive ten per cent of the gross sales price of machinery to be manufactured and sold by another corporation. There was no obligation on the part of the latter either to manufacture or sell its machinery and, because of that contingency, the taxpayer and the Government agreed (as the record filed with this Court shows) that the contractual right which the taxpayer received had no ascertainable fair market value at the time of the 1940 liquidation. Thus in that case no question could be or

was raised either in the District Court or in this Court on appeal as to whether the taxpayer's right to payments had any ascertainable fair market value in 1940. Instead the question there, unlike that here, was whether the amounts paid to the taxpayer in 1941 and 1943, pursuant to her contractual rights, should be treated for income tax purposes as ordinary or capital gain in the subsequent years involved there. On that question this Court held that, since the contractual right had no ascertainable market value when the liquidation occurred in 1940, the transaction had not been closed and that receipts in later years should be taxed as capital gain. In reaching its conclusion this Court said (p. 91) that the value of the contract would doubtless have been computed as capital gain if it had been found to have an ascertainable market value at the time of the liquidation, and decided that the capital gain treatment should also be given to payments made in years subsequent to a liquidation if made pursuant to a contract whose value could not be ascertained at the time of liquidation.

As this Court pointed out in the *Westover* case (p. 92) the factual situation there is almost identical with that in *Commissioner v. Carter, supra*, and the question in both cases was also the same. It is also of course significant that in the *Carter* case the Government and the taxpayer involved there stipulated that the oil brokerage contracts which the latter received upon the liquidation had no ascertainable market value when distributed and a statement to that effect appears in the opinion (p. 911). But

in this case the parties have not made such stipulation. Instead the Commissioner has determined that the contractual rights did have a fair market value at the time of liquidation, and the taxpayers have offered no evidence to disprove the figure determined by the Commissioner and adopted by the Tax Court. Consequently, the cases on which taxpayers primarily rely are distinguishable.

Taxpayers also cite a number of cases in footnotes numbered 12 through 17 (Br. 16) but, as they point out that these cases are cited because they apply the principle of the *Logan* case, we do not think it necessary to discuss them individually. What we have already said answers any contention which can be made as to such cases, since it indicates that the question here is primarily one of fact and that each case must be judged by its own facts. Of course if a case involves facts similar to those in the *Logan* case or the *Westover* case, then it may be assumed that the contingent factors will be too great to permit any finding of a fair market value for the property right involved. But those cases do not hold that the mere presence of a contingent factor will prevent such a valuation. Most cases do have some contingent elements; yet proper estimates may properly be made if there are other definite and established factors indicating a reasonable value. At any rate, in this case the Commissioner and the Tax Court have found that a fair market value could be determined and their determination is supported by substantial evidence. In *Bradford v. Commissioner*, 22 T.C. 1057 (decided before the instant case), and *Lentz v.*

Commissioner, 28 T.C. 1157 (decided shortly after this case), the Tax Court made specific findings that in view of the contingent elements in those cases no fair market value was ascertainable. Because the question is largely, if not wholly, one of fact, taxpayers are not warranted in relying on those cases or in citing them to show inconsistency in the Tax Court's decisions.

D. Taxpayers must report gain from contractual rights in the year received

Taxpayers also argue that even if it be assumed that the San Gabriel contracts did have a fair market value they were not required to report any gain therefrom until payments thereunder were actually received by them because they were all on the cash basis. We do not agree and neither did the Tax Court.

In this connection, taxpayers cite *Kasper v. Banek*, 214 F. 2d 125 (C. A. 8th); *Amend v. Commissioner*, 13 T.C. 178, and Rev Rul. 58-162, 1958-15 Int. Rev. Bull. 12, but these authorities discuss constructive receipt of income and do not support taxpayers' contention. The situation described in each is similar in that each refers to a farmer, who is on a cash basis, and who has agreed toward the end of a named year to sell his wheat but has made a contract which calls for delivery as well as payment early in the subsequent year. They hold that the gain realized from the sale of the wheat is not taxable until the later year and that the principle of constructive receipt would not apply there because the farmer had no

right to any payment until the wheat was delivered in the year following his agreement to sell. But we do not have a comparable situation here and there has been no attempt on the part of the Commissioner or the Tax Court to tax any gain which has been only constructively received. In this case, the taxpayers received, in addition to cash, contractual rights which they admit has value but which they deny had fair market value at the time of the liquidation. As the Tax Court determined otherwise, it properly held that the fair market value of the contracts must be included in computing the gain the taxpayers realized from their liquidating dividends.

II

The Tax Court Correctly Held That The Taxpayer Albert Gersten Was Not Entitled To File A Joint Income Tax Return For 1950 With His Alleged Wife Bernice Ann Gersten

At the beginning of the taxable year 1950, Albert Gersten was married to Lucille Gersten. On April 3, 1950, the latter obtained an interlocutory decree of divorce in an action filed in the Superior Court of California for the County of Los Angeles. Before that decree became final, Albert went to Mexico where he obtained a divorce from Lucille on November 2, 1950, and on the same day married again. He and his alleged second wife (Bernice Ann Gersten) were at all times throughout 1950 residents and domiciliaries of California. Albert and Bernice later filed a joint income tax return for 1950 but the Commissioner refused to accept it as such because he determined

that under the law of California Albert was not legally married to Bernice. (R. 21, 68, 80, 87.) The Commissioner determined that Albert and Bernice were not entitled to file a joint return and the Tax Court accepted his determination.

The authority for filing joint returns is given in 1939 Code Section 51(b) (1) (Appendix, *infra*) which provides merely that "A husband and wife may make a single return jointly." The Tax Court held that the question of whether persons are husband and wife within the meaning of Section 51 must be determined by state law. The taxpayer agrees but does not accept the Tax Court's interpretation of California law.

Taxpayer criticizes "the literal rigidity" with which the Tax Court has interpreted the applicable provisions of California law. (Br. 37.) He also asserts that Congress did not intend to limit words "husband and wife", as used in 1939 Code Section 51, to spouses whose status has "the greatest degree of validity under local law" (Br. 32) but intended to make joint returns available "without regard to the niceties of local law" (Br. 41). We can not agree. The applicable provisions of California law are written in such plain and concise language that they should be and have been repeatedly interpreted and applied strictly as written. Moreover they require the decision reached here by the Tax Court as related to Code Section 51.

Section 90 of the California Civil Code (Appendix, *infra*) states that marriage can be dissolved only by death of one of the parties or by the judgment of a court of competent jurisdiction decreeing a divorce of the parties. As we shall point out below, that means a final decree, not an interlocutory one, and

under the facts here it also means that the only court having competent jurisdiction is one in California. As to remarriage, Section 61 (Appendix, *infra*) provides that a *subsequent marriage* contracted by any person during the life of a former husband or wife is *illegal and void from the beginning unless the former marriage has been annulled or dissolved*; and that *in no case can a marriage of either of the parties, during the life of the other, be valid in California if contracted within one year after entry of an interlocutory decree of divorce*.

Section 131 of the California Civil Code, in providing for the entry of an interlocutory decree in a divorce action, states that after entry of such decree neither party shall have the right to dismiss the divorce action without the other's consent; and Section 132 provides that "when one year has expired after the entry of such interlocutory judgment" the court may enter "the final judgment granting the divorce." (Appendix, *infra*.) Section 132 also provides that *the final judgment shall restore the parties to the status of single persons and permit either to marry after the entry thereof*, but it explains that if either should die before the entry of final judgment, *the entry of that judgment shall not validate any marriage contracted by either party before the entry of such final judgment nor constitute any defense of any criminal prosecution made against either*.

A further provision applicable here is Section 150.1 of the Civil Code (Appendix, *infra*). That section provides that *a divorce obtained in another jurisdiction shall be of no force in California if both parties*

to the marriage were domiciled in California at the time the proceeding for the divorce was commenced. As we have pointed out, the parties admit that Albert was domiciled in California all during 1950, which means he was not only domiciled there when Lucille filed her divorce action against him but also domiciled there when he obtained a divorce in Mexico and was married there. Thus if the clear language of Section 150.1 is followed here, it is evident that Albert's Mexican divorce should be given no force and effect in California. Moreover, as his Mexican divorce and marriage occurred less than a year after the entry of the interlocutory decree in California, it is contrary to Sections 61 and 132, *supra*, and should also be held invalid under those sections.

In contending otherwise, taxpayer relies primarily on the recent decision in *Spellens v. Spellens*, 49 A.C. 213. In that case, the plaintiff was married to her alleged second husband in Mexico four days after the entry by a California court of an interlocutory decree of divorce from her first husband. The plaintiff asked that her second marriage be declared valid and that her second husband, from whom she was then separated, be required to furnish support and maintenance. The second husband contended that he was not liable for the plaintiff's support because their marriage had been contracted before the entry of the final divorce decree and was void for that reason. But the Supreme Court of California said that he was estopped from making such a defense and pointed out that the validity of a divorce decree can not be contested by a party who has married in reliance thereon or has aided another to procure the decree so that the latter

will be free to marry. Consequently, it was held that he was not in a position to deny support and maintenance to the plaintiff. That does not mean that the court found that the plaintiff's second marriage was valid. Indeed it refused to do so, for it said (p. 222) :

The theory is that the marriage is not made valid by reason of the estoppel but that the estopped person may not take a position that the divorce or latter marriage was invalid. * * *

Then, in explaining its position further, the court stated immediately following the long excerpt from which taxpayer quotes (Br. 35-36) that (pp. 223-224) :

The foregoing authorities involved an estoppel to deny the validity of a decree invalid because of lack of jurisdiction of the court which purported to grant it but we think the same policy requires the same result in the instant case where there was a marriage before a year after the entry of an interlocutory decree. The policy applies equally in one case as the other. The policy against a bigamous marriage expressed in the first sentence of section 61 of the Civil Code, *supra*, involved in the cited cases, is no stronger nor more compelling than that involved here which is that there may not be a valid marriage if contracted within less than a year after the entry of an interlocutory decree of divorce. (Civ. Code, § 61, subd. 1, *supra*.) We fail to see any difference in this case and one where defendant had participated in the obtaining of an invalid Nevada or Mexican divorce rather than a California interlocutory decree. *It is not the marriage which is found valid as indicated by the above*

authorities and thus the policy of section 61, subdivision 1, is not thwarted. Rather it is that defendant by reason of his conduct will not be permitted to question its validity or the divorce; so far as he is concerned, he and plaintiff are husband and wife. The interlocutory decree declared that the parties were entitled to a divorce and it was not unreasonable for plaintiff to have been led to believe that a marriage in Mexico would be valid. The circumstances here clearly show fraud and estoppel as far as the defendant is concerned; it would be difficult to imagine a stronger case in this field of law.

It may be noted also that we are not recognizing a common-law marriage which does not exist in this state for *the theory is that the marriage is not validated; it is merely that defendant cannot contest it. * * ** (Italics supplied.)

We think it is obvious that the *Spellen* case is not applicable here and that it should be followed only in situations where one party to the second marriage is attempting to take advantage of the other. In such a situation, the Supreme Court of California has said that public policy requires that the doctrine of estoppel be applied to prevent an inequitable result. But in this case we do not have a comparable situation. Not only is the Commissioner free to consider whether Albert and his alleged second wife are validly married but, as the Tax Court held, he is required to do so, and there are many California decisions which support the position taken by the Commissioner and the Tax Court as to the invalidity of Albert's second marriage.

The principle which we think should be applied

here was well stated years ago in *Estate of Dargie*, 162 Cal. 51, 121 Pac. 320, in which it was said (pp. 53-54):

It is the final judgment that grants the divorce. The interlocutory judgment does not have that effect. It merely declares the right: that the party is "entitled" to a divorce, a divorce to be afterwards adjudged. By the terms of the statute, it is the final judgment alone that grants the divorce, dissolves the marriage, restores the parties to the *status* of single persons, and permits each to marry again. The statute does not itself declare the marriage dissolved at the expiration of the year from the interlocutory judgment. It merely suspends for one year the power of the court to dissolve it, and in effect, provides that it becomes dissolved only when, after the expiration of that period, the court has, by its final judgment, so declared. In the mean time the parties remain in the legal relation of husband and wife. * * *

The above principle has frequently been applied by the California courts in varying situations. For example, in *Brown v. Brown*, 170 Cal. 1, 147 Pac. 1168, the first wife was allowed to recover certain property from the second wife after the death of their husband, because it had been acquired by him while the interlocutory divorce decree was still in effect and so was community property obtained before the first marriage relation was severed. The same conclusion was reached under similar circumstances in *Berry v. Berry*, 140 C.A. 2d 50, 294 Pac. 2d 757. In *Paulus v. Bauder*, 106 C.A. 2d 589, 235 Pac. 2d 422, a wife was not allowed to sue the husband in tort after the entry

of an interlocutory divorce decree and before entry of the final decree because it was held they were still married. And in *Estate of Seiler*, 164 Cal. 181, 128 Pac. 334 it was held that, although an interlocutory divorce decree had been entered, the woman whose estate was involved there was still married to her husband at the time of her death and for that reason the latter had a prior right to administer her estate.

The Tax Court's interpretation of California law is in accord with that of this Court in *United States v. Holcomb*, 237 F. 2d 502, affirming *per curiam*, 137 F. Supp. 619 (N. Cal.), and *Commissioner v. Ostler*, 237 F. 2d 501. In each of those cases the Commissioner took the position that, during the period between entry of the interlocutory divorce decree and entry of the final decree, the spouses were not "husband and wife" within the meaning of 1939 Code Section 51 and could not file joint income tax returns, but this Court held otherwise.⁷ This Court stated that its decision in the *Holcomb* case was based on the reasons advanced in the District Court's opinion. These are set forth in the following excerpts (pp. 619-620):

Admittedly the parties herein were not divorced in 1951. It is elementary that in California an interlocutory decree of divorce does not destroy the marriage. *Brown v. Brown*, 170

⁷ In view of this Court's decisions in the above cases the Commissioner has now issued a ruling stating that a husband and wife who are separated under an interlocutory decree retain the relationship of husband and wife until the divorce decree becomes final. See Rev. Rul. 57-368, 1957-32 Int. Rev. Bull. 23 (Appendix, *infra*).

Cal. 1, 147 P. 1168. Nor were they legally separated by what is commonly known as a decree of separate maintenance. * * * Defendant however contends that the section in question also applies to persons who, while still legally married for other purposes, were "legally separated * * * under a decree of divorce". This contention has been made before and has been rejected. The identical issue was raised in *Marriner S. Eccles v. Commissioner of Internal Revenue*, 19 T.C. 1049, affirmed, 4 Cir. 208 F. 2d 796, which held that since an interlocutory decree under Utah law did not dissolve the marriage, a joint return was proper. In the case of *William G. Ostler v. Commissioner*, Docket No. 52185, T.C. Memo 1955—207, filed 7/25/55, the same result was reached on the same issue under California law.

In the *Ostler* case, this Court pointed out (as did the District Court in the *Holcomb* case) that Code Section 51 had been interpreted in the same way in *Commissioner v. Eccles*, 208 F. 2d 796 (C.A. 4th) [involving an interlocutory divorce decree by a Utah court], and in *Commissioner v. Evans*, 211 F. 2d 378 (C.A. 10th) [involving an interlocutory decree by a Colorado court]. In view of these decisions and the specific provisions of the California Civil Code, we submit that the Tax Court correctly decided that Albert and his alleged second wife were not entitled to file a joint return for the year involved here.

CONCLUSION

The decision of the Tax Court on both issues is correct and should be affirmed.

Respectfully submitted,

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July, 1958

APPENDIX

Internal Revenue Code of 1939:

SEC. 51. INDIVIDUAL RETURNS.

* * * *

(b) [as amended by Sec. 303, Revenue Act of 1948, c. 168, 62 Stat. 110] *Husband and Wife*.—

(1) *In general*.—A husband and wife may make a single return jointly. Such a return may be made even though one of the spouses has neither gross income nor deductions. If a jointly return is made the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.

* * * *

(26 U.S.C. 1952 ed., Sec. 51.)

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss*.—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount Realized*.—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

* * * *

(26 U.S.C. 1952 ed., Sec. 111.)

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.* — Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

* * * *

(26 U.S.C. 1952 ed., Sec. 112.)

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

* * * *

(c) *Distributions in Liquidation.* — Amounts distributed in completed liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 115.)

California Civil Code, West Annotated California Codes (1954⁸):

SEC. 61. *Bigamous and polygamous marriages; exceptions; absentees*

A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such

⁸ Although the above sections of California law are taken from the 1954 edition of the Civil Code all of the provisions given were in effect prior to 1950, the taxable year here.

former husband or wife, is illegal and void from the beginning, unless:

1. The former marriage has been annuled or dissolved. In no case can a marriage of either of the parties during the life of the other, be valid in this state, if contracted within one year after the entry of an interlocutory decree in a proceeding for divorce.

* * * *

SEC. 90. *Methods of dissolution*

Marriage is dissolved only:

One—By death of one of the parties; or

Two—By the judgment of a Court of competent jurisdiction decreeing a divorce of the parties.

SEC. 131. *Decision and conclusions; interlocutory judgment*

In actions for divorce, the court must file its decision and conclusions of law as in other cases, and if it determines that no divorce shall be granted, final judgment must thereupon be entered accordingly. If it determines that the divorce ought to be granted, an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce; and the court may, in its discretion and regardless of whether or not a request therefor was included in the prayer of the complaint, restore the maiden name of the wife or the name under which she was married. After the entry of the interlocutory judgment, neither party shall have the right to dismiss the action without the consent of the other.

SEC. 132. *Final judgment; one year waiting period*

When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce, and such final judgment shall restore them to the status of single persons, and permit either to marry after the entry thereof; and such other and further relief as may be necessary to complete disposition of the action, but if any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has been finally disposed of, nor then, if the motion has been granted or judgment reversed. The death of either party after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment as hereinbefore provided; but such entry shall not validate any marriage contracted by either party before the entry of such final judgment, nor constitute any defense of any criminal prosecution made against either.

SEC. 150.1 *Foreign divorce of parties domiciled in state; effect*

A divorce obtained in another jurisdiction shall be of no force or effect in this State, if both parties to the marriage were domiciled in this State at the time the proceeding for the divorce was commenced.

SEC. 150.2 *Domicile, prima facie evidence*

Proof that a person hereafter obtaining a divorce from the bonds of matrimony in another

jurisdiction was (a) domiciled in this State within twelve months prior to the commencement of the proceeding therefor, and resumed residence in this State within eighteen months after the date of his departure therefrom, or (b) at all times after his departure from this State and until his return maintained a place of residence within this State, shall be prima facie evidence that the person was domiciled in this State when the divorce proceeding was commenced.

Rev. Rul. 57-368, 1957-32 Int. Rev. Bull. 23:

SECTION 51(b).—INDIVIDUAL RETURNS: HUSBAND AND WIFE

* * * *

In the light of the decision in *Commissioner v. William G. Ostler*, 237 Fed. (2d) 501, reconsideration has been given to the issue involved in I. T. 3761, C. B. 1945, 76; I. T. 3934, C. B. 1949-1, 54; I. T. 3942, C. B. 1949-1, 69; I. T. 3944, C. B. 1949-1, 56; and Revenue Ruling 55-178, C. B. 1955-1, 322, and the nonacquiescences by the Internal Revenue Service in the decisions in *Marriner S. Eccles v. Commissioner*, 19 T.C. 1049, affirmed 208 Fed. (2d) 796; and *Alice Humphreys Evans v. Commissioner*, 19 T.C. 1102, affirmed 211 Fed. (2d) 378, C.B. 1953-2, 8.

Each of the income tax rulings referred to in the preceding paragraph involves the question of whether payments made pursuant to an interlocutory decree of divorce by a husband for the support of his wife are includible in the gross income of the wife under section 22(k) of the Internal Revenue Code of 1939 and deductible by the husband under 23(u) of such Code. The court decisions involve the question of whether a

taxpayer and his former wife are entitled to file a joint income tax return for a certain taxable year, notwithstanding the fact that prior to the end of such year, they were legally separated under an interlocutory decree of divorce.

I.T. 3761, *supra*, holds that periodic payments made pursuant to an interlocutory decree of divorce in the State of California by a husband for the support of his wife are includible in her gross income under section 22(k) of the Internal Revenue Code of 1939 and deductible by the husband under section 23(u) of such Code. The parties were considered divorced or "legally separated" for the purpose of section 22(k) of the Code, and the payments made pursuant to the interlocutory decree which awarded alimony for an indefinite period of time were considered periodic payments.

I.T. 3934, *supra*, holds that where the time for making payments of alimony under an interlocutory decree of divorce in the State of California is limited to the duration of the decree (12 months), the payments made pursuant to the decree do not qualify as "periodic payments" under section 22(k) of the Code and are not deductible from the gross income of the husband under section 23(u) of the Code. I.T. 3761, *supra*, was modified accordingly.

I.T. 3944, *supra*, holds that payments to be made for a definite period of time shall be considered to be "installment payments" and not "periodic payments" within the meaning of section 23(k) of the Code. Therefore, since I.T. 3761 and I.T. 3934, *supra*, are distinguishable, the modification of the former ruling was withdrawn.

I.T. 3942, *supra*, holds that the parties named in an interlocutory decree of divorce in the State of California are considered, for Federal income tax purposes, to be legally separated for the purposes of sections 25(b) and 51(b) of the Code. Revenue Ruling 55-178, *supra*, also holds that an interlocutory decree of divorce may effect a legal separation under a decree of divorce or of separate maintenance under section 23(k) of the Code.

In William G. Ostler, *supra*, the court held that an individual and his spouse who were separated under an interlocutory decree of divorce retained the relationship of husband and wife until the decree became final and were entitled to file a joint return of income under section 51(b) of the Internal Revenue Code of 1939. Similar decisions were reached in *Marriner S. Eccles v. Commissioner*, 208 Fed. (2d) 796, nonacquiescence C.B. 1953-2, 8; *Alice Humphreys Evans v. Commissioner*, 211 Fed. (2d) 373, nonacquiescence C.B. 1953-2, 8; *United States v. William F. Holcomb and Adris M. Holcomb*, 237 Fed. (2d), 502; *Joyce Primrose Lane v. Commissioner*, 26 T.C. 405.

Due to the adverse decision in the William C. Ostler case, the Internal Revenue Service now withdraws the nonacquiescences and substitutes acquiescences in the Marriner S. Eccles and Alice Humphreys Evans cases. See page 7 of this Bulletin. For the same reason the following rulings, referred to above, are revoked: I.T. 3761, I.T. 3934, I.T. 3942, I.T. 3944 and Rev. Rul. 55-178.

The cases and income tax rulings cited above relate to the Internal Revenue Code of 1939.

Under the provisions of the Internal Revenue Code of 1954 a husband and wife who are separated under an interlocutory decree of divorce retain the relationship of husband and wife until the decree becomes final and are entitled to file a joint return of income in the same manner as they were entitled to file such a return under the 1939 Code. Under the 1954 Code, however, where the husband and wife are living apart and file separate returns, payments made during the period covered by the interlocutory decree may constitute periodic payments taxable to the wife and deductible by the husband.

The revocation of I.T. 3934 I.T. 3944, above, does not affect the question of whether payments limited to the duration of an interlocutory decree of divorce are periodic payments for the purposes of section 71(a)(3) of the Internal Revenue Code of 1954.

No. 15945

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

ALBERT GERSTEN, MYRON P. BECK and ANN H. BECK,
MILTON GERSTEN and MARY GERSTEN,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition to Review a Decision of the Tax Court of the
United States.

REPLY BRIEF OF PETITIONERS.

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Petition to Review a Decision of the Tax Court of the
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REPLY BRIEF OF PETITIONERS.

ISSUE I.

- A. The Basic Issue Is Whether Petitioners' Income Should Be Measured by "Resort to Estimates, Assumptions and Speculation", or by Payments Received as and When Received.

Respondent states the issue as being "one of determining whether the contracts here had a fair market value when distributed¹ . . ." (Resp. Br. p. 16.) Apart

¹It is assumed that respondent uses the phrase "fair market value" and the phrase "ascertainable fair market value" interchangeably, in view of his statement "that contracts like the ones here do have an ascertainable fair market value" on p. 23 of his brief.

from the effect of the rule of *Amend v. Commissioner of Internal Revenue*, 13 T. C. 178 (1949), separately discussed below, petitioners agree with this statement of the issue. Respondent continues, however, stating that “such a question has been repeatedly held to be a question of fact” and accordingly, that the issue is to be determined by the facts, so that the principles of *Burnet v. Logan*, 283 U. S. 404, are barred from consideration because its rationale may not be reached in the face of a conclusion by a trial court of the existence of ascertainable fair market value.

Petitioners see no useful purpose in debating whether or not the question of ascertainable fair market value or fair market value is one of pure fact or of mixed fact and law. Certainly an ultimate conclusion of a given value may well constitute a question of fact; but the road which reaches such a conclusion is paved with well established legal principles. Perhaps no better example of this exists than the judicial processes which took place in the case of *Burnet v. Logan*, *supra*, relied upon by the petitioners.

In the *Logan* case, taxpayer in 1916 had sold stock owned by her in a corporation which had, as one of its assets, the right to purchase iron ore which might be mined from a particular iron mine. The sale price of this stock, in addition to cash, included a promise to pay to the selling taxpayer 60¢ for each ton of ore sold to the corporation.

The findings of fact disclosed that from 1913 through 1926, several million tons of ore were mined. The Court further found as a fact that, as of March 11, 1916, the

mine had ore reserves of almost 83,000,000 tons and an expected life of 45 years.

Petitioners adduced testimony that no general market for the sale of their contract existed and that the contract had no ascertainable fair market value. Respondent introduced testimony, by two experts, respecting the ore reserves and the ability accurately to determine the ore reserves and the life of the mine. The experts on both sides agreed that economic conditions would affect the amount of ore mined in any one year. In fact, the evidence showed that the quantity of ore mined in any one year fluctuated greatly from 303,020 tons in 1921 to 3,029,265 tons in 1923 and that during the four year period prior to the sale of stock by taxpayer, the amounts mined varied from a high of 2,311,940 tons in 1915 to a low of 1,212,227 in 1914. There was no obligation on the part of the corporation owning and operating the mine to mine any ore in any year and neither the selling taxpayer nor the purchaser of the stock nor the corporation whose stock was sold could compel any such mining of ore by reason of contractual or other rights.

The Board of Tax Appeals (now the Tax Court) found that the selling taxpayers could reasonably expect to receive, over a period of approximately 45 years, an aggregate amount of approximately \$6,000,000.00 and accordingly that the value of the contracts received by them as additional consideration for the sale of the stock, amounted to approximately \$2,000,000.00. This determination was based upon a present value of an aggregate of approximately \$6,000,000.00 payable ratably over a period of 45 years. That was the amount of the fair

market value determined by the respondent and used by him in computing deficiencies in taxes against the taxpayers.

The case was appealed and the Circuit Court of Appeals, Second Circuit, reversed the Tax Court. The Supreme Court granted certiorari. The opinion of the Circuit Court of Appeals will be referred to only to supplement the discussion of the Supreme Court's opinion.

The Tax Court found as an ultimate fact, there, as here, that the fair market value of the contract,² received by the taxpayer as part consideration for her transfer of the stock, was ascertainable. Accordingly, it determined that the measure of taxpayer's gain was the amount of cash, plus such fair market value of the contract minus her basis for the stock so transferred. The Supreme Court, however, held that, as any figure arrived at would be the result of mere estimates, assumptions and speculation, the contract had no ascertainable fair market value.^{2a}

The opinion of the Circuit Court of Appeals expressed the foregoing in much the same vein but also noted the fact that "the estimate of recoverable tonnage of ore is very much in dispute; likewise the annual production and period of years estimated to complete the mining." (42 F. 2d 193, 196.) What was there involved, as here, was not conflicting testimony respecting the accuracy of any known fact, but a dispute concerning the estimates,

²Parenthetically, it should be here noted that the basis of distinction by respondent of the cases relied upon by petitioners, is the absence of a finding by the Tax Court of the ultimate fact of the existence of fair market value.

^{2a}See Appendix for excerpt of opinion.

and accordingly, the inferences and conclusions which might be drawn from those evidentiary facts which the trial court held to be correct.³

It is apparent, therefore, that the Tax Court may not, by mere articulation that there be a fair market value, so find; nor may the Tax Court, in seeking to decide whether there be an ascertainable fair market value, ignore the standards laid down by the appellate courts having jurisdiction to review its decisions. Neither the findings of fact adverted to by respondent⁴ nor the generalization of the Tax Court, quoted by the respondent, that the "record amply sustains the respondent in his determination" adhere to such standards.

B. The Particular Findings of Fact Pointed Out by Respondent as Supporting Tax Court's Decision Do Not Do So.

The so-called finding based upon the presumption of the correctness of respondent's determination (Resp. Br. p. 17) which respondent discusses as one of those findings of fact which support the Tax Court's decision, is not a finding of fact at all. Respondent contends that petitioners neither met their burden of overcoming the presumption of correctness of respondent's determination nor, indeed, made any attempt so to do. In support thereof, he

³For this purpose, the conclusions of the Circuit Court of Appeals and the Supreme Court were just as valid even if they assumed, *arguendo*, that time would prove that the estimates of the government's experts and not of the taxpayers to be the more accurate.

⁴Subdivision B, entitled "Findings of fact which support the Tax Court's decision." (Resp. Br. p. 16.)

referred to the colloquy between the trial judge and petitioners' counsel. [R. p. 153.]^{4a}

Nothing else in the Record can possibly justify respondent's statement on this point; nor does the quoted material.

Petitioners met their burden by proving the following:⁵

(1) That nothing was payable by San Gabriel under contracts except to the extent of an amount measured by a percentage of amounts received by San Gabriel from certain of its customers.

(2) These amounts fluctuated substantially from year to year.

(3) That neither San Gabriel nor petitioners had a legal right to require San Gabriel customers to purchase any water, in any amount, or at any given time.

(4) That the contingent right measured in the next two preceding paragraphs was limited by a ceiling amount.

(5) That these contingent rights in any event were extinguished at a fixed period of time.

Petitioners further proved, by the uncontradicted testimony of Mr. Moseley and Mr. Garnier that the amount of water to be sold by San Gabriel depended upon many contingencies, some of which were weather changes from year to year, varying conditions of the houses, and varying economic conditions.⁶ The existence of these contingencies

^{4a}See Appendix for excerpt of Record on which Respondent relies.

⁵Paragraphs 1 through 70, both inclusive, and paragraphs 72 through 78, both inclusive, the Supplemental Stipulation of Facts [R. pp. 105-122, both inclusive] and Exhibits 1 to 7, made a part of the Stipulation. [R. p. 120.]

⁶Note the testimony of Mr. Moseley. [R. p. 200.]

as affecting the amount of water sold is grudgingly conceded even by respondent in his brief at pages 19 and 25.

No more was proved by the taxpayers in *Logan, Smith, Carter* or *Bradford*, and yet in each of those cases, the Court necessarily held that the taxpayers had met their burden of proof to overcome the presumption of correctness of the Commissioner's determination.

Since petitioners met this burden, it was thereupon incumbent upon respondent to go forward with his proof as if the presumption had never existed.⁷

In *Wiget v. Becker*, 84 F. 2d 706, 708, the court described the nature of the presumption of correctness as a "burden of proof presumption" which merely requires "the other party to proceed with the negative. Unless he does, he loses; *when he does, the presumption is out of the case, and the issue is open.*" (Emphasis added.)

The Tax Court itself recognized this principle in *Friedlaender v. Commissioner*, 26 T. C. 1005 (1956).

Accordingly, in considering whether the findings of fact, upon which respondent relies, support the Tax Court's conclusion, no gloss of inferences favorable to respondent may be added because of the presumption of correctness which in the first instance shields respondent's determination.

As to each contention respondent makes respecting the evidence (other than the sales of the six contracts to be separately discussed) he must concede the existence

⁷*U. S. v. Pulver*, 54 F. 2d 261 (C. C. A. 2nd, 1931), cited in *Wiget v. Becker*, 84 F. 2d 706 (C. C. A. 8th, 1936), and *Friedlaender v. Commissioner*, 26 T. C. 1005 (1956), A. 1957—1 CB 4, *A. and A. Tool and Supply Co. v. Commissioner*, 182 F. 2d 300 (10th Cir., 1950).

of variables and contingencies⁸ affecting the use of water, and consequently the payments under the contracts. This factor renders impossible a commutation of future payments to a present value, even if the estimates purported to be as expert and unequivocal as those made in *Logan*. Respondent so concedes with respect to the commencement of payments and the unexpired period of time,⁹ with respect to occupancy,¹⁰ and with respect to the 70% estimate.¹¹

The burden was upon respondent to bring before the trial court such facts upon which he wished to rely to demonstrate a use of water in such a sufficiently regular and steady stream that a commutation of the consequent regular future payments could be made "without resort to mere estimates, assumptions and speculation" as were accepted by the Board of Tax Appeals but rejected by the Circuit Court of Appeals and by the Supreme Court of the United States in *Burnet v. Logan* (*supra*).

Whether or not respondent could have adduced evidence by way of stipulation or testimony to refute the facts relied upon by petitioners, he may not estimate the comparative amount of water used for indoor purposes, he may not assume that the occupants of the houses will, by some fortuitous circumstances, constitute in large measure lovers of plants and lawns,

⁸The trial judge more candidly expressed additional examples of variations, recognizing that not all people have the same amount of "plantings and vegetation needing irrigation" or the same "number of water consuming appliances." [R. p. 70.]

⁹Resp. Br. p. 19 ". . . there were of course some contingencies such as variations in weather."

¹⁰Resp. Br. p. 20 "We do not of course know how many people would be using water under contracts here."

¹¹Resp. Br. p. 21 the "seventy per cent would be an average return on such contracts as some would pay off much less and some would pay off more."

flowers and trees as distinguished from lovers of cactus and rock gardens or of black top and concrete, nor may he speculate that the section here involved was "a nice residential section in which the home owners would take a great deal of pride". (Resp. Br. p. 19.) Whether respondent refers to the payments which he predicts will continue for seven to ten years or to the probable occupancy or to the 70% average, he must estimate, assume or speculate. Moreover, the estimates are much more equivocally made than those which were made by the experts and struck down by the Supreme Court in the *Logan* case.

Respondent also adverts to the fact of six sales of contracts similar to those here involved. Petitioners have covered in their opening brief,¹² the circumstances, or more accurately, the virtually complete lack of known circumstances surrounding these sales.

If the reference to the sales is for the purpose of demonstrating that a market existed in which contracts such as these readily passed from hand to hand in commerce with such reasonable regularity and continuity that the quoted sales price of the contracts would be sufficient to establish the existence of a fair market value, petitioners submit that the existence of the six sales have no persuasive value. By proving facts which brought the transactions here involved squarely within *Burnet v. Logan*,¹³ *J. C. Bradford v. Commissioner*,¹⁴ *Commissioner v. Carter*,¹⁵ *Westover v. Smith*,¹⁶ and *Lents v. Commissioner*,¹⁷ petitioners over-

¹²Petitioners' Opening Brief, page 24.

¹³283 U. S. 404.

¹⁴22 T. C. 1057.

¹⁵170 F. 2d 911 (C. C. A. 2, 1948).

¹⁶173 F. 2d 90 (C. A. 9, 1949).

¹⁷28 T. C. 1157 (1957).

came the presumption of correctness of respondent's determination, and that presumption disappeared from the case. Therefore, it was not incumbent upon petitioners to prove the negative, the non-existence of the market. If, on the other hand, respondent desired to rely upon the fact that such a market existed, the burden was on him to prove it.

The underlying facts in this case are not in conflict. Any conflict which did arise related solely to matters of opinion, and not to the events and transactions which actually occurred.

C. Respondent's Distinction of the Cases Relied Upon by Petitioners Is Unsound.

Respondent's distinction of the *Logan* case seems to be that the future in this case, unlike the facts and circumstances upon which the promise of future payments was there contingent, could be foretold with "fair certainty". (Resp. Br. p. 24.) It is ironic that even as respondent seeks to escape the "estimates, assumptions and speculation" rejected in *Logan*, he must qualify the certainty he attributes to San Gabriel's sales with "some variations in revenue due to seasonal changes and *other causes*".¹⁸ (Resp. Br. p. 25.) (Emphasis added.)

Respondent adds, apparently as a further distinction, that there is also evidence here that similar contract rights had been sold by other persons "whereas there was no similar evidence in the *Logan* case". On this point, the

¹⁸Respondent's neat conversion of "variations in weather" to "seasonal changes" does not help, for the Record shows variations in rainfall from year to year and if it did not the Court may take judicial notice thereof. As for "other causes", it is unrefuted that at least one such "other cause" of varying use of water was economic conditions, a factor which played so important a part in the *Logan* case.

Circuit Court of Appeals, whose decision¹⁹ was affirmed by the Supreme Court on substantially the same rationale, stated at page 195, that

“Congress, by the phrase ‘fair market value’ meant that, not only must the market price be ascertained by sales, but [the] sales so made, and the circumstances under which they were made, were to be considered to determine whether such sales served to evidence . . . a market sale”

With a limited exception²⁰ the Record does not disclose the terms or conditions or the time of any of the six isolated sales, or whether or not they were made under circumstances involving a willing buyer or a willing seller neither of whom were compelled to buy or sell.

Respondent's distinction of *Westover v. Smith*²¹ is based upon the reasoning that “no question could be or was raised either in the District Court or this Court on Appeal as to whether the taxpayer's right to payment had any ascertainable fair market value in 1940”. Respondent, however, overlooks the rationale of the Court's opinion in the *Smith* case, that in order to avoid speculation resulting in inaccuracies and inequities, the proper procedure is to measure the value of the contract as the payments are received.²² The *Carter* case, of course, as indicated both by respondent in his brief (Resp. Br. pp. 26-27) and the Court in the *Smith* case, expresses the same rationale.

To distinguish *Bradford v. Commissioner*, 22 T. C. 1057, the facts of which appear to be virtually identical

¹⁹42 F. 2d 193.

²⁰We know only that one sale was made in 1953 [R. p. 231] and the price in another appeared to be 12% of the outstanding balance.

²¹173 F. 2d 90.

²²Note the Court's opinion at page 92.

with those here involved, respondent's sole distinction is based upon the fact that the Tax Court there "made specific findings that in view of the contingent elements . . . no fair market value was ascertainable." (Resp. Br. p. 28.) The Tax Court, however, in the *Bradford* opinion, sheds light on the reason for its finding, upon which respondent relies, when it treats this type of contract as indistinguishable from those of *Commissioner v. Carter* and *Westover v. Smith*, closing this phase of its opinion (at p. 1073) as follows:

"The above cases [Carter and Smith] rely primarily upon *Burnet v. Logan*, 283 U. S. 404, which, we agree, is controlling."

That the Tax Court there held one way, and here the opposite, justifies not a distinction, but a reversal.

Lents v. Commissioner, 28 T. C. 1157, is virtually identical in facts with *Commissioner v. Carter*, *supra*.

D. Even a Fixed Promise to Pay Money in the Future Is Not a Cash Equivalent.

In respondent's further discussion of *Kasper v. Banek*, 214 F. 2d 125, *Amend v. Commissioner*, 13 T. C. 178, and Revenue Ruling 58-162, 1958-15 Int. Rev. Bull. 12, it is apparent that he mistakenly believes that the taxpayers there each had "made a contract which calls for *delivery as well as payment* early in the subsequent year". (Resp. Br. p. 28.) (Emphasis added.) The court's opinion in the *Kasper* case, on page 126 discloses that the purchaser actually had possession of the wheat at the time of the contract for sale. In the *Amend* case, which the U. S. Court of Appeals for the 8th Circuit approved in the *Banek* case, the Tax Court, at page 183, found as a fact that shipment was to be made at once with payment in the subsequent year.

Similarly, in the Revenue Ruling, at page 13, the statement is made, relying on *Amend*, that "the seller had no legal right to demand and receive payment for his wheat until *the year following* the contract of sale and *delivery*." (Emphasis added.)

From the foregoing it is apparent that respondent's attempt to distinguish these authorities, on the basis of delayed delivery, is erroneous.

Respondent's basic distinction of the *Kasper* and *Amend* cases, and the Revenue Ruling rests in the fact that those authorities simply discuss constructive receipt of income. The point of the decision and the Revenue Ruling, however, and their pertinence here, lies in the determination that, if there be no constructive receipt of income, the cash basis taxpayer is not required to report in income, as a cash equivalent, the value of the contract in the year he obtains the contract.

The concept articulated in these cases, finds its roots in *Bedell v. Commissioner of Internal Revenue*, 30 F. 2d 622 (C. C. A. 2, 1929). In that case, L. Hand, Circuit Judge, pointed out²³ that even if the case were like a promise to pay in the future for a title which passes at the time of the contract, the profit would still not be reckoned as of the time of sale.

In the case of *Johnston v. Commissioner*, 14 T. C. 560 (1950), a stockholder (a cash basis taxpayer) sold stock of a corporation under a contract whereby the stock was delivered to the purchaser²⁴ in 1942, but the purchase price

²³At page 624 (see Appendix for excerpt).

²⁴The headnote of the reported case erroneously describes delivery of the stock to the "sellers" but the text of the opinion, at page 563, makes it clear that such delivery was, of course, to the "purchasers".

(which was subject to adjustments) was deposited with a bank in escrow for payment, early in 1953, and, in the absence of intervening claims, the balance later in 1953.

The Tax Court held that even if, *arguendo*, petitioner was correct in his contention that the cash deposit in the bank in 1942 was subject to petitioner's demand that since his share of the deposited cash "was less than his basis for gain on his stock . . . he, on a cash basis, realized no gain until the 'amount realized' by receipt exceeds that basis. *Burnet v. Logan*, 283 U. S. 404."²⁵

The court, in support of its holding, made the following observation, at page 565:

"But such an agreement to pay the balance of the purchase price in the future has no tax significance to either purchaser or seller if he is using a cash system."

In support of its position, the Tax Court also relied upon *Bedell v. Commissioner*, *supra*.

That the uncertainty caused by the adjustment was an unimportant factor in the court's decision is evidenced by *Ennis v. Commissioner*, 17 T. C. 465 (1951), which, like the *Johnston* case on which it relied, was reviewed by the entire Tax Court. It held that the obligations flowing to the seller under the contract were not the "equivalent of cash", stating, at page 470, that

"in determining what obligations are the 'equivalent of cash', the requirement has always been that the obligation, like money, be freely and easily negotiable so that it readily passes from hand to hand in commerce."

The point of the authorities cited in this subdivision is not unrelated to the concept of the *Logan* case, that

²⁵At page 565.

basically, the income tax is levied upon income or gain and not upon capital. True it is that unlike the *Burnet v. Logan* case, these authorities involved promises to pay a fixed or specified amount in the future, but even though the amount be so fixed, it is apparent that such a future obligation, if not freely traded in commerce, may still fall short of that cash equivalent which must be included in the measure of income tax, as money's worth. Obviously, where the promise to pay in the future is not fixed but is contingent upon future events involving estimates, assumptions and speculation, the presence of a cash equivalent is even more remote.

ISSUE II.

The Joint Return Issue.

In support of the Tax Court's decision, respondent primarily relies upon Section 90, Section 61, Sections 131 and 132, and Section 150.1 of the California Civil Code. The sections cited by respondent are not all directly applicable, although petitioner does not deny that there is an interrelationship between them. However, the issue with which we are directly concerned here is not whether petitioner Albert Gersten (sometimes herein called "Albert") obtained a decree of divorce, final or interlocutory, in California, or a decree of divorce in Mexico, valid or invalid, but simply whether, on December 31, 1950, insofar as California law was concerned, he was married to Bernice Ann Gersten (sometimes herein called "Bernice"), with whom he filed a joint return. The question of the validity or effectiveness of his prior divorce decree or decrees are material only to the extent that they may preclude recognition under California law of a marriage in 1950 between Albert and Bernice.

The California Civil Code section which primarily concerns us here, therefore, is Section 61 which, with Section

132, are the only sections relating to a subsequent marriage cited by respondent. The other California Civil Code sections cited by him relate only to the matter of divorce or dissolution.

Respondent contends (Resp. Br. p. 30) that the “applicable provisions of California law are written in such plain and concise language that they should be and have been repeatedly interpreted and applied strictly as written”. It may be that Section 61 is written in plain and concise language and it is certainly true that that section has been often interpreted. It is not true, however, that the interpretations have been consistent, or that the section has been applied strictly as written.²⁶ Otherwise, it is difficult to understand why the Supreme Court of California, in *Spellens v. Spellens*, 49 Cal. 2d 210, went to the lengths which it did to reconcile the apparent prohibition of Section 61 with its conclusion, at page 220, that

“The public policy of this state (California) requires the *preservation of the second marriage* and the protection of the rights of the *second spouse* ‘rather than a dubious attempt to resurrect the original’ marriage. (*Rediker v. Rediker*, 35 Cal. 2d 796, 806.)” (Emphasis added.)

In each of the cases, the “original marriage” was, under respondent’s view of the law, still in existence. It becomes pertinent, therefore, to ask to what second marriage the Supreme Court referred in *Spellens v. Spellens* (*supra*), *Rediker v. Rediker* (*supra*), and *Dietrich v. Dietrich*, 41 Cal. 2d 497. See also *Watson v. Watson*, 39 Cal. 2d 305.

²⁶(The cases interpreting Section 61 are, *Spellens v. Spellens*, 49 Cal. 2d 210 (1957); *Sullivan v. Sullivan*, 219 Cal. 734 (1934); *Estate of Elliott*, 165 Cal. 339, 132 Pac. 439 (1913); *Dominguez v. Dominguez*, 136 Cal. App. 2d 17 (1955), and *Parmann v. Parmann*, 56 Cal. App. 2d 67, 132 P. 2d 851 (1942). In *Spellens*, the California Supreme Court announced that to the extent the remaining four might be to the contrary, they were overruled.)

The California Supreme Court, at page 221, went so far as to restrict its prior statement in *Rediker v. Rediker*, "that the doctrine of estoppel 'presupposes the entry of final decree'" by declaring that it did not lay down a rule contrary to the Court's conclusion in *Spellens*, but even "if it seems to do so none is indicated in the other and later authorities heretofore cited."²⁸

The court then went on to distinguish various cases, including *Estate of Elliott*, 165 Cal. 339 (1913), where Section 61 was relied upon, and which, in its basic facts, almost completely parallels both *Estate of Dargie*, 162 Cal. 51, 121 Pac. 320, and *Estate of Seiler*, 164 Cal. 181, 128 Pac. 334, relied upon by respondent.

On the subject of California Civil Code, Section 61, which respondent contends is written in "plain and concise language", and the contention that it has been "applied strictly as written," the California Supreme Court in the *Spellens case*, at page 221, has this to say:

"An interlocutory decree of divorce at least gives color as a judicial determination of divorce especially when we consider that the final decree ordinarily follows at the end of a year as a matter of course."

This statement, even without reference to the background of the facts in the *Spellens case*, seems rather to support the proposition that "the plain and concise" language of Section 61, respecting the validity of a marriage "contracted within *one year* [not four days] after the entry of an interlocutory decree" is given something less than a strict interpretation.

In view of the foregoing, it becomes unnecessary to discuss at any length the remaining sections of the California Civil Code cited by respondent. Section 90 applied

²⁸(At p. 221.)

to Mrs. Spellens, but that did not prevent the California Supreme Court from preserving her second marriage. Section 131 is material only in that it supports the comments of the court in the Spellens opinion concerning the finality of the interlocutory decree. The portion of Section 132 to which respondent refers (Resp. Br. p. 31) has no greater force or validity than Section 61, with which the *Spellens* case dealt. California Civil Code, Section 150.1 lends no aid to respondent, since at the most it provides that Albert's Mexican divorce was invalid; but Mrs. Spellens obtained no Mexican divorce and accordingly, Albert's position is at least as strong as hers.

Respondent seeks to distinguish the *Spellens* case upon the ground that it did not validate the second marriage but simply estopped the defendant from denying support and maintenance to the plaintiff (Resp. Br. p. 33). Accordingly, respondent (Resp. Br. p. 34) contends that the *Spellens* case should be limited to "situations where one party to the second marriage is attempting to take advantage of the other". Such a distinction and such a limitation may find some comfort in the language that "the theory is that marriage is not validated", but it is certainly inconsistent with the determination by the court in the *Spellens*, *Rediker*, *Dietrich* and *Watson* cases to the effect that it is California's law and policy to preserve the second marriage, though that second marriage took place after a decree of divorce which was either an interlocutory decree in California or a foreign decree of questionable validity.

Although the concepts of the preservation of the second marriage, on the one hand, and its invalidity, on the other, may present an apparent conflict and ambiguity it is certain and clear that all the property rights which pertain to the most regular of marriages, apply also to the second

marriage, preserved under the *Spellens* rule²⁹ and as between the parties, all the rights of status apply. Accordingly, respondent, in interpreting Section 51(b) of the 1939 Internal Revenue Code, should use as his guide the congressional purpose for its enactment³⁰ and recognize a marriage which has enough validity to entitle the parties thereto to all marital rights, including ownership by each of one-half of the community income. Otherwise, respondent will have achieved the absurd result of reinstating the advantage in favor of community over non-community property state domiciliaries, whose status is similar to that of Albert and Bernice and of Mr. and Mrs. Spellens, an advantage which Congress sought to abolish.

When respondent suggests that the *Spellens* case "should be followed only in situations where one party to the second marriage is attempting to take advantage of the other" (Resp. Br. p. 34), he ignores the purpose of California law, dictated by its public policy, in cases such as these, to preserve the second marriage, and not to attempt to resurrect the dead first marriage. Since respondent concedes that state law applies, he would do well to accept rather than to thwart its basic policy.

Respondent has not always been as rigid in his attitude toward second marriages such as that here involved and as involved in the *Spellens* case, as is evident from *General Counsel Memorandum 25250*, Cum. Bull. 1947-2, p. 32, cited and discussed in Petitioners' Opening Brief at pages 40 and 41.

The cases of *Estate of Dargie*, 162 Cal. 51, *Brown v. Brown*, 170 Cal. 1, and *Estate of Seiler*, 164 Cal. 181

²⁹(At p. 222.)

³⁰(Cf. House Committee Report; 1948 Revenue Act. C.B. 1948-1, p. 301.)

(Resp. Br. pp. 35-36) lend nothing to respondent's position, since the reasoning directed above to Section 90 has equal application to the relationship of these cases to the point here involved. The same may be said of *Commissioner v. Ostler*, 237 F. 2d 501,³¹ and *United States v. Holcomb*, 237 F. 2d 502, where no second marriage was involved.

Paulus v. Bauder, 106 Cal. App. 2d 589, decided prior to the *Spellens* case and by an intermediate California appellate court, is an example of the first wife being unable to sue her husband in tort after the interlocutory decree but prior to the final decree. If that be significant, even more so should be the holding of the California Supreme Court in the *Spellens* case in refusing to permit the second wife from pursuing a tort remedy against her husband of the second marriage.

Respectfully submitted,

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Attorney for Petitioners.

³¹The court somewhat reluctantly rejected the merits of Commissioner's argument that the interlocutory decree be treated as one of legal separation, but did so to be uniform with other decisions from other Circuits. Had the opinion in the *Spellens* case, particularly respecting the finality of the California interlocutory decree, preceded the *Ostler* case, the court's reluctance might well have been increased.



APPENDIX.

INTERNAL REVENUE CODE OF 1939

Section 51. Individual Returns

(a) * * *

(b) Husband and Wife.—

(1) In General.—A husband and wife may make a single return jointly. Such a return may be made even though one of the spouses has neither gross income nor deductions. If a joint return is made the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.

* * *

* * *

* * *

(5) Determination of Status.—For the purpose of this section.— * * *

(B) An individual who is legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.

CIVIL CODE OF CALIFORNIA

Section 61. (Subsequent marriages void: Exceptions: Interval following divorce: Marriage valid until annulled where former spouse absent)

A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless:

1. The former marriage has been annulled or dissolved. In no case can a marriage of either of the parties during the life of the other, be valid in this state, if contracted within one year after the entry of an interlocutory decree in a proceeding for divorce.

2. Unless such former husband or wife is absent, and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or is generally reputed or believed by such person to be dead at the time such subsequent marriage was contracted. In either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal.

CIVIL CODE OF CALIFORNIA

Section 90. (Marriage, how dissolved.)

Marriage is dissolved only:

One—By the death of one of the parties; or,

Two—By the judgment of a Court of competent jurisdiction decreeing a divorce of the parties.

CIVIL CODE OF CALIFORNIA

Section 131. (Filing decisions and conclusions: Entry of final or interlocutory judgment: Restoration of maiden name: Dismissal.)

In actions for divorce, the court must file its decision and conclusions of law as in other cases, and if it determines that no divorce shall be granted, final judgment must thereupon be entered accordingly. If it determines that the divorce ought to be granted, an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce; and the court may, in its discretion and regardless of whether or not a request therefor was included in the prayer of the complaint, restore the maiden name of the wife or the name under which she was married. After the entry of the interlocutory judgment, neither party shall have the right to dismiss the action without the consent of the other.

CIVIL CODE OF CALIFORNIA

Section 132. (Final judgment granting divorce: Entry after one year: Effect of judgment: Entry where appeal taken or new trial motion made: Effect of death of party: Entry no validation of intervening marriage nor defense to criminal charge.)

When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce, and such final judgment shall restore them to the status of single persons, and permit either to marry after the entry thereof; and such other and further relief as may be necessary to complete disposition of the action, but if any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has been finally disposed of, nor then, if the motion has been granted or judgment reversed. The death of either party after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment as hereinbefore provided; but such entry shall not validate any marriage contracted by either party before the entry of such final judgment, nor constitute any defense of any criminal prosecution made against either.

CIVIL CODE OF CALIFORNIA

Section 150.1. (Divorce in another jurisdiction of no effect where parties domiciled in State.)

A divorce obtained in another jurisdiction shall be of no force or effect in this State, if both parties to the marriage were domiciled in this State at the time the proceeding for the divorce was commenced.

Excerpt from *Burnet v. Logan*, 283 U. S. 404, at pages 412 and 413:

“Nor does the situation demand that an effort be made to place according to the best available data some approximate value upon the contract for future payments. This probably was necessary in order to assess the mother’s estate [for estate tax purposes]. As annual payments on account of extracted ore come in they can be readily apportioned first as return of capital and later as profit. The liability for income tax ultimately can be fairly determined *without resort to mere estimates, assumptions and speculation*. When the profit, if any, is actually realized, the taxpayer will be required to respond. The consideration for the sale was \$2,200,000.00 in cash and the promise of future money payments wholly contingent upon facts and circumstances not possible to foretell with anything like fair certainty. The promise was in no proper sense equivalent to cash. *It had no ascertainable fair market value.*” (Emphasis added.)

Excerpt from Record at page 153.

“The Court: Well, I want to ask counsel for the petitioner: *The respondent in his determination*, as I understand it, *has placed the amount* in computing the receipts from liquidation of the corporation in respect to these water main matters at *50 per cent?*

Mr. Shearer: Yes, your Honor.

The Court: Now, assuming that the Court concludes the argument or contention relying on *Logan versus Burnett*, and *Westover versus Smith*, is not well taken, *is the petitioner contesting the 50 percent determination?*

Mr. Shearer: We are not conceding it, your Honor, but we recognize we will not have met our burden in overcoming . . .

The Court: You what?

Mr. Shearer: We do not conclude it, but we recognize that we will not have met our burden in connection with the presumption.

The Court: All right. In other words, you don't intend to put on any proof?

Mr. Shearer: Not valuation *with respect to that point.*" (Emphasis added.) [R. p. 153.]

Excerpt from *Bedell v. Commissioner of Internal Revenue*, 30 F. 2d 622 (C. C. A. 2, 1929), at page 624.

"If a company sells out its plant for a negotiable bond issue payable in the future, the profit may be determined by the present market value of the bonds. But if land or a chattel is sold, and title passes merely upon a promise to pay money at some future date, to speak of the promise as property exchanged for the title appears to us a strained use of language, when calculating profits under the income tax. . . . It is absurd to speak of a promise to pay a sum in the future, as having a 'market value,' fair or unfair. Such rights are sold, if at all, only by seeking out a purchaser and higgling with him on the basis of the particular transaction. Even if we could treat the case as an exchange of property, the profit would be realized only when the promise was performed."



No. 15,950
United States Court of Appeals
For the Ninth Circuit

BIDART BROS., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the
Southern District of California,
Northern Division.

Honorable Gilbert H. Jertberg, Judge.

APPELLANT'S OPENING BRIEF.

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FILED

1938

PAUL R. O'BRIEN, CLERK



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No. 15,950

United States Court of Appeals For the Ninth Circuit

BIDART BROS., a corporation,
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the
Southern District of California,
Northern Division.

Honorable Gilbert H. Jertberg, Judge.

APPELLANT'S OPENING BRIEF.

Comes now Bidart Bros., a farming corporation, having its principal place of business in Saco, Kern County, California, and appeals to the above-entitled Court from a decision of the United States District Court, Southern District of California, Northern Division, denying appellant the right to recover certain income tax monies which appellant claims are the result of an illegal assessment by the Director of Internal Revenue.

PLEADINGS AND FACTS SHOWING JURISDICTION.

The case involves a claim for refund of income taxes paid under protest as a deficiency assessment by the District Director, United States Treasury Department, Internal Revenue Service, R. A. Riddell [3].

The District Court has jurisdiction of the action by virtue of the provisions of Title 28, *U.S.C.A.* §1346 (a) (1) and Title 26, *U.S.C.A.* §7422.

Findings of Fact, Conclusions of Law and Judgment were signed by Judge Jertberg, judge of the United States District Court, Southern District of California, Northern Division, on January 9, 1958, and Judgment was entered on said day [31-35]. Notice of Appeal was timely filed on February 10, 1958 [36]. Bond for costs on appeal and Designation of Contents of Record on Appeal were also filed, giving this Court jurisdiction of the appeal under the provisions of Title 28, *U.S.C.A.* §1291 and §1294, since the question involved does not concern a situation embracing a direct appeal to the Supreme Court as authorized by §1252 and §1253 of Title 28, *U.S.C.A.*

STATEMENT OF THE CASE.

The Complaint alleges that the plaintiff returned and filed with the Department of Internal Revenue its Income Tax Return for the period May 1, 1951, to April 30, 1952. Said Return, among other things, dealt with crops growing on leased land, which plain-

tiff had held, owned and occupied for more than six months, and which plaintiff sold with said growing crops to one and the same party in one and the same transaction. In the Return above mentioned plaintiff treated the transaction as a single transaction and as a long-term capital gain. The Director of Internal Revenue in auditing the Return levied a deficiency assessment in the amount of \$107,258.90 by denying capital gains treatment to the growing crops upon said leased lands, segregating the crops, and by treating the profit alleged to have been attributed to the crops as ordinary income [1-5].

The Answer admitted [10-11] and the Findings of Fact found the allegations of the Complaint true [31-34].

As Conclusions of Law the Court found that plaintiff had not sustained its burden of proving that the gain on the sale of unharvested crops on leased land came under the provisions of §117 (j) (3) of the Internal Revenue Code; that a leasehold estate for years is not "land" within the meaning of the section; that plaintiff was entitled to no refund, and entered judgment accordingly [34-35].

ASSIGNMENTS OF ERROR.

1. The legal sufficiency of Conclusions of Law II, III and IV is challenged.

2. The Judgment is against law for the reason that under the Findings of Fact plaintiff should be entitled to the relief prayed for.

LEGAL QUESTIONS INVOLVED.

The Assignments of Error raise the following legal matters:

1. Growing crops on leased land which has been held, owned and occupied for more than six months, which is sold with said growing crops to one and the same party in one and the same transaction, are entitled to capital gains treatment rather than to ordinary income treatment, by virtue of the provisions of §117 (j) (3) of the Internal Revenue Code, as amended in 1951.

2. Treasury Department Regulation 111, paragraph 29.117, being contradictory to the plain meaning of the statute, is invalid and void.

ARGUMENT.

POINT I.

HISTORICAL BACKGROUND.

Prior to 1951 the Internal Revenue Act, Section 117 (j) dealing with the sale or exchange of properties used in trade or business provided:

“(j) Gains and losses from involuntary conversion and from the sale or exchange of certain property used in the trade or business

(1) Definition of property used in the trade or business. For the purposes of this subsection, the term ‘property used in the trade or business’ means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (1), held for

more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. Such term also includes timber with respect to which subsection (k) (1) or (2) is applicable.

(2) *General rule.* If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. For the purposes of this paragraph:

(A) In determining under this paragraph whether gains exceed losses, the gains and losses described therein shall be included only if and to the extent taken into account in computing net income, except that subsections (b) and (d) shall not apply.

(B) Losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets held for more than 6 months shall be considered losses from a compulsory or involuntary conversion.”

While the Act was in this status sales of land with crops growing thereon presented problems in respect to whether the crops growing upon the land were subject to capital gains treatment or to ordinary income treatment. The Tenth and Fifth Circuit Courts in discussing the problem held the crops to be subject to capital gains treatment. In *McCoy v. Commissioner*, 192 Fed. 2d 486 (10th Circuit) the Court held a growing crop of wheat sold with the land, which had been held for more than six months, to be entitled to capital gains treatment. In *Owen v. Commissioner*, 192 Fed. 2d 1006 (5th Circuit), the Court held that a crop of oranges partially grown upon the land, which had been held for more than six months and sold together with the crop, was entitled to capital gains treatment. In *Watson v. Commissioner*, 197 Fed. 2d 56 (9th Circuit), a crop of oranges growing upon land held for more than six months and sold was held to be subject to segregation and the price attributable to the land entitled to capital gains treatment and the price attributable to the crop to treatment as ordinary income.

This condition was called to the attention of Congress, which in 1951 amended Section 117 (j) by adding a paragraph (3), which reads as follows:

“Sale of land with unharvested crop. In the case of an unharvested crop on land used in the trade or business and held for more than 6 months, if the crop and the land are sold or exchanged (or compulsorily or involuntarily converted as described in paragraph (2) (at the same time and to the same person, the crop shall be considered as ‘property used in the trade or business.’ ”

Prior to the addition of §117 (j) (3) the policy of the Commissioner was “ ‘upon the sale of a going business it (the sales price) is to be comminuted into its fragments, and these are to be separately matched against the definition in §117 (a) (1) . . . ’. It is consistent also with the policy of the Bureau of Internal Revenue and the Tax Court, dating, at least, from the statement made by the Bureau in 1946, that, under circumstances comparable to those before us, ‘regardless of their stages of development, any gain realized from the sale of growing crops is ordinary income.’ ”

After the amendment adding §117 (j) (3) the Treasury Department promulgated Regulation 111, Paragraph 29.117, which reads in part “. . . a leasehold or estate for years is not ‘land’ for purposes of this section.”, and based upon its regulation has continued to segregate the land and the crops in the event of a pertinent sale, and to treat the increment of the crops as ordinary income, its theory being that since a leasehold estate, as distinguished from a fee simple title, is not considered an estate in freehold and as such entitled to treatment for purposes of

conveyance, inheritance and probate, as real estate, but on the other hand is merely an estate for years, and as such entitled to treatment only as personal property, or as a chattel real. *Footnote, 97 Law Ed. 1241.*

Whether the Department is entitled to uphold such a construction is the sole and only point before this Court. It is submitted that the construction of the Department and the position of the defendant before this Court in upholding the Department is unsound because:

1. It is contrary to the plain language of the amendment to the 1951 Act.

2. The construction, in effect, confuses "land" with "land tenure."

3. The construction of the Department and the position of the defendant here are contrary to the legislative intent, which appears in the legislative history of the Act, contained in Senate Report No. 781, issued September 18, 1951, and in the debates in reference to the Act, contained in Congressional Record, Volume 97, at pages 11811, 11814 and 12376.

4. Since the position of the Department and of this defendant is contrary to the plain meaning of the statute and to the express Congressional intent, it is void.

POINT II.

THE INTERPRETATION OF THE DIRECTOR IS CONTRARY TO THE PLAIN LANGUAGE OF THE AMENDMENT TO THE 1951 ACT.

Assistance can be gained by paraphrasing portions of Section 117 (j) (3):

1. “. . . in the case of an unharvested crop on land used in the trade or business and held for more than six months.” There is no question here that the crop was unharvested at the time of the transaction. Necessarily, therefore, it had to be growing upon land, for land is the only place upon or in which a crop might grow.

2. “. . . land used in the trade or business and held for more than 6 months.” The leases involved had been held for a period of 5 to 8 years, and were used in the business of farming of plaintiff.

3. “. . . if the crop and the land are sold . . . at the same time and to the same person.” The stipulated facts accept this feature of the section. The transaction was a unit transaction between plaintiff and Wheeler Farms, a copartnership. A copartnership, corporation or other legal entity has been uniformly held in the eyes of the law to be a “person.” It is obvious that this portion of the section has been complied with.

4. To further paraphrase “. . . the crop shall be considered as ‘property used in the trade or business.’” Section 117 (j) (1), in existence before and since the amendment adding 117 (j) (3), dealt with the definition of “property used in trade or business.” It had two requirements:

(a) Of a character subject to depreciation of real property; and

(b) Held for more than six months.

Section 117 (j) (3), in effect, has added a third specie of property which shall be considered "property used in the trade or business." The first two specie of property mentioned in Section 117 (j) (1) are subject to the following limitations:

(a) Property of a kind which would properly be includible in the inventory, if on hand at the close of the taxable year; and

(b) Property held primarily for sale to customers in the ordinary trade or business.

Neither of these exclusions can by any stretch of the imagination apply, because a growing crop would not be inventoried, and growing crops are not the subject of sale in the ordinary course of business, rather, only matured crops are so subject.

The clear and plain meaning of the amendment is to state that if the land is used in the ordinary trade or business, and held for six months, and is the subject of a sale in a single transaction which includes the crop growing thereon, the transaction is a single transaction, indivisible, and is subject to capital gains treatment as provided in Section 117 (j) (2), which is the identical treatment used by the plaintiff taxpayer and contested by the Department and Government.

POINT III.

**THE CONSTRUCTION, IN EFFECT, CONFUSES
"LAND" WITH "LAND TENURE".**

It is to be noted that Section 117 (j) (3) when passed was made applicable to tax years beginning after December 31, 1950 (1951) Internal Revenue Act, Section 323 (c). The Regulation relied upon by the Government is Regulation 111, Par. 29.117, which was promulgated February 3, 1953, three years after the effective date of the amendment. Just how the Department is qualified, by a promulgation, contrary to the express intent of Congress, to make it retroactive for over a period of three years, is difficult of comprehension.

The pertinent part of the Regulation relied upon by the Government (referring to Section 117 (j) (3)) is ". . . a leasehold estate for years is not 'land' for the purpose of this section." If it is anything more than a statement "black is white," it amounts to an attempt to confuse "land" with "land tenure." The word "land" is the solid material matter of which the earth is constructed, and is one of the three basic elements composing the world, the other two being water and atmosphere. Such is the definition given in Webster's New International Dictionary, 2d Edition:

Land is 'the solid part of the surface of the earth as distinguished from water constituting a part of such surface.'

Webster gives as the law definition of land:

"any ground, soil, or earth whatsoever regarded as the subject of ownership . . ."

“an interest or estate in land, loosely a tenement or hereditament.”

Webster's definition of a leasehold:

“a tenure by lease on the land held; specifically land held as personalty under a lease for years.”

It is that which is the subject of ownership, in varied forms. One's ownership in land may be absolute, such as fee simple, or fractionally absolute, such as tenancy in common. The character of this tenure is the right to the possession of the whole, either solely or in conjunction with others, unabridged by time, that is to say, in perpetuity.

There are lesser degrees of land tenure, life estates, for instance, which contemplate absolute possession but limited in continuity to the life of the life tenant. Land tenure is further delineated in perpetuity by another method, namely, a given number of days, months or years, and a system of land tenure is characterized as leasehold and dealt with in the law as a chattel real, whereas the other measures of land tenure dealt with in law are commonly characterized as real property. This characterization is a misnomer at most and amounts to nothing more than one character of land tenure as distinguished from another. This distinction is recognized in legal treatises. Webster defines a leasehold as “a tenure by lease on the land held.”

Ballentine's Law Dictionary defines land as “a word which includes not only the soil, but everything attached to it, . . .”, and leasehold as “an estate in

real property which is conveyed to a tenant by his landlord when the landlord makes a lease of the property to the tenant. This leasehold estate is then in law entirely separate and distinct from the estate which the landlord retains."

It follows, therefore, that since the language of Section 117 (j) (3) uses the word "land" without any distinction between varying methods of land tenure or estates in land, the purported Regulation which seeks to inject into the definition of "land" certain methods of land tenure, to the exclusion of others, is to that extent directly contrary to the plain and unambiguous language of the Revenue Act in question.

POINT IV.

THE CONSTRUCTION OF THE DEPARTMENT AND THE POSITION OF THE DEFENDANT HERE ARE CONTRARY TO THE LEGISLATIVE INTENT.

The legislative history, Senate Report 781 of September 18, 1951, contains the following discussion, from which it will be noted that the position of the Bureau and of the cases were before the Committee. It considered the position of the Bureau that growing crops constituted property primarily held for sale to customers and therefore entitled to separate treatment, it is also noted that the Committee had before it the conflicting views of the various circuits, previously noted. It concludes:

"Your committee believes that sales of land together with growing crops or fruit are not such

transactions as occur in the ordinary course of business and should thus result in capital gains rather than in ordinary income.”

Senator George made the following comment:

“Mr. President, the committee bill provides that where land is sold together with the unharvested crop or fruit upon such land, the gain resulting from such sale shall be treated as a capital gain. Under existing law, there is uncertainty and litigation as to whether the gain from the sale of the crop must be determined separately and treated as ordinary income or whether the entire gain is a capital gain. It is provided in the bill that in such cases no deduction shall be allowed with respect to the expenses attributable to the production of the unharvested crop but that such expenses shall be included in the cost of the crop in determining the amount of the gain, that is, in arriving at a proper base upon which to tax a capital gain.”

The report of the Senate Committee was accepted by the House in the Conference Report:

“This amendment provides rules for the application of Section 117 (j) in cases where land bearing an unharvested crop is sold. The provision applies in cases where the land has been held for more than 6 months. The period that the crop has been on the land is immaterial. The House recedes.”

On September 21, 1951, Senator Humphrey in debating the Revenue Act of 1951 on the Senate Floor makes the following statement, recorded in Volume 97, Congressional Record, Part 9, at page 11811:

"Of course, if we are to extend treatment like this to ordinary property used in the conduct of a business, then we have to extend it to the livestock people, to the turkey people, and I see no reason why we should not extend it to others.

Our basic problem in taxation is equality of treatment of those similarly situated. The farmer who disposes of property used in his business should not be taxed differently from the manufacturer or merchant who does the same thing."

And, further, quoting from page 11814, given by the same senator on the same day:

"If we are to give capital gains treatment to an unharvested crop, I submit we should give capital gains treatment to every farmer who harvests his crop. The same kind of treatment should be given to every farmer."

And Senator Holland, on September 28, 1951, made the following remarks, recorded in the Congressional Record, Volume 97, at page 12376:

"Mr. President, there are many good features in this bill which have not been commented upon. I am sorry that the time limitation prevents me from doing any more than to call attention to a provision which I have not heard mentioned and that is the change of the capital gains tax as it applies to a citrus grove, an apple orchard, or any other farming property in this nation when it is sold, after ownership of more than 6 months, as a property with an unharvested crop on it.

Under the very unwise rulings, it seems to me, of the Internal Revenue Bureau, such a sale has been regarded as a double sale, and the tax au-

thorities have forced a division which did not exist at all in the minds of those who made the sale and the purchase—an artificial division of the sale of the real estate from the sale of the unharvested crop. Under the amendment which is placed in the bill, if the property has been held 6 months that result will no longer be permitted, but, instead, the sale will be treated just as it has actually existed, as a single sale of a developed property with a feature on it, an unharvested crop, which entered into that single sale without the artificial handling required in some jurisdictions under the present rule, which, by the way, is not uniformly approved by the courts. Some courts have approved the rule of the Internal Revenue Bureau and some have frowned upon it. *The result of the amendment is to make uniform this matter and to give a fair deal to our agricultural people all over the nation.*

I call attention to the fact, Mr. President, that this is a matter which does not generally concern the very rich people. *This is something that applies to the farmers, small and large, who will be permitted to sell their properties now with security, whereas they have been denied that security under the law as it is now mistakenly enforced.*”

The foregoing discussions bring into focus the following propositions:

1. That Congress was aware of the conflicting decisions in respect to the treatment of growing crops.
2. That Congress considered the position of the Department of Internal Revenue as discriminatory.

3. That Congress intended the amendment to apply to farmers of all kinds, both large and small, rich and poor.

4. That Congress was concerned with the proposition of whether the crop was mature or immature, and not with the length of time it had been growing or the degree or stage of its maturity.

5. That Congress was not concerned with the character of tenure under which the land was occupied by the farmer.

6. That Congress foresaw that there were "pitfalls" in fee land transactions as great as in leased land transactions, and guarded against the same by providing that such transactions, whether in leased land or in fee land, were entitled to treatment only as ordinary income if the transactions were of such a character that the taxpayer held the same primarily for sale to customers in the ordinary course of his trade or business.

POINT V.

CASES CONSTRUING THE AMENDMENT.

There is no enlightening case law dealing with the amendment, but two cases reported since the amendment, dealing with conditions existing before, have noted the amendment.

The case of *Watson v. Commissioner*, supra, reached the Supreme Court in 1953 and was affirmed by a divided Court of six to three, the three dissenters being presently upon the bench and three of the ma-

jority as well. Justice Minton states (97 Law Ed. 1243):

“In amending the Revenue Act of 1951 Congress took cognizance of the construction placed upon Section 117 (j) (1) by the Commissioner and the Tax Court and amended the section to make it abundantly clear that unharvested crops were a part of the land upon which they were grown and were to be given special capital gains treatment.”

And further commenting upon the Committee Report he quotes:

“Your Committee believes that sale of land together with growing crops or fruit are not such transactions as occur in the ordinary course of business and should thus result in capital gains rather than in ordinary income.”

And further:

“Congress was correcting a misinterpretation of the Revenue Act by the Commissioner and the Tax Court.”

Smith v. Cole, 218 Fed. Rep. 2d 667, decided by the 9th Circuit in 1955, also dealt with the Act before the amendment. In that case the majority of the Court reversed the Trial Court because it made no specific finding on the value of the crop of immature oranges as of the date of the sale to the son, and suggested that “some value” be given it under the rule of the *Watson* case. This case also had a dissenter, Justice Healy, who stated:

“There was no basis in fact for ascribing any value to the growing oranges at the time the orchard was sold.”

POINT VI.

SINCE THE POSITION OF THE DEPARTMENT AND OF THIS DEFENDANT IS CONTRARY TO THE PLAIN MEANING OF THE STATUTE AND TO THE EXPRESS CONGRESSIONAL INTENT, IT IS VOID.

The rule is well settled that where an executive department is authorized to make rules of procedure the rules so made are subject to the requirement that they enforce the spirit of congressional legislation, and when they fail to do so or are contrary to the express congressional intent, they are void. *Hagger v. Helvering*, 308 U. S. 389, 60 Sup. Ct. 337 (1940), 54 Harvard Law Review 377; *Sanford v. Commissioner*, 308 U. S. 39, at 53 (1939), 84 L. Ed. 20; *Barnett v. Chicago Portrait*, 285 U. S. 1, at 16 (1932); *Dragoon v. U. S. A.*, 144 Fed. Sup. 188 (1957); *Scofield v. Lewis*, 251 Fed. Rep. 2d 128.

 POINT VII.

THE OPINION OF THE COURT BELOW IS ERRONEOUS.

In the Court's memorandum [18 to 30] great stress was made in respect to the question of whether "land" could be classified as "real property" or "personal property." The Court concluded that "ownership" of the land was an essential element of bringing a transaction involving an unharvested crop within the purview of Section 117 (j) (3) of the Revenue Code of 1939. We are all agreed that the term "land" refers to "the solid substance of the earth."

The opinion of the Court overlooks the fact that "the solid substance of the earth" may be owned or

possessed in varying ways, from a tenancy at sufferance up through the more permanent degrees of land tenure, including estates for years, for life, and fee simple.

The opinion also overlooks the fact that a complete ownership of the entire fee in land is not a prerequisite to a sale.

“Sale,” according to Webster’s Dictionary, is defined as:

“The act of selling, the exchange of property of any kind, or of some services, for an agreed sum of money or other valuable consideration; a contract made for the transfer of property.”

Taking the opinion at its face value, to-wit, that the entire fee in land is a prerequisite to a “sale” of “land,” it could easily be argued that such a transaction would be a physical impossibility, because even land owned in “fee” does not embrace entire “ownership.” Would land subject to a mortgage be excluded? Would land sales under contract be excluded where a balance remains unpaid? How could the land be divorced from a lien for taxes, which affixes itself in March and is not payable until October? Would the Court only consider sales involving the entire ownership of land sales between October (after the taxes were paid) and March (before the next year’s tax became a lien)? Suppose the land were subject to an improvement assessment due over a number of years; would such transactions be ruled out? Obviously, a “sale” of “land” according to the common understanding of the term, is not so con-

fining, but rather it embraces the estate, whatever it may be, which the occupant has in the land, whether that estate be considered an estate in freehold and classified for certain purposes as "real property," or whether it be considered a chattel real and classified for certain purposes as "personal property."

It is further submitted that the emphasis given by the Court to the word "land" is contrary to the spirit of the Act as a whole.

Furthermore, Section 117 (j) was adopted in 1938 and was given the broad title "Capital Gains and Losses from Involuntary Conversion and from the Sale or Exchange of Certain Property Used in the Trade or Business." Subdivision (1) contains a definition. It reads:

"Definition of Property Used in the Trade or Business. For the purposes of this section the term 'property used in trade or business' means property used in the trade or business of a character which is subject to the allowance for depreciation provided in *Section 23 (1)* held for more than 6 months, and *real property* used in the trade or business held for more than 6 months which is not (a) property includable in inventory, etc. . . . (b) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."

The type of property subject to allowance for depreciation provided for in Section 23 (1) is:

"A reasonable allowance for exhaustion, wear and tear (including a reasonable allowance for obsolescence) (1) of property used in the trade

or business, or (2) property held for the production of income."

The word "property" is defined in Webster's as:

"Any property, real or personal, which the owner has the right to control, use and dispose of, as he will; . . . something being possessed."

and

"A specific piece of land or real estate."

The Revenue Code stressed not whether the article involved was of such a character as to be considered real or personal, but it was concerned with (1) the business use thereof, and (2) whether the property used in the business was primarily for sale to customers in the ordinary course of business. The controversy which resulted in the adoption of Section 117 (j) (3) arose because of the Treasury Department's regulation that growing crops constitute property held by a farmer for sale to customers in the ordinary course of trade or business, and for that reason were excluded from capital gains treatment—not for the reason that the crop might be growing on leased lands, as distinguished from lands held under other forms of tenure. By the addition of "(j) (3)" the Act itself differentiates between *land* and *real property*.

It is true that the cases which presented the problem at the time it was considered by Congress all, by coincidence, dealt with sales of freehold estates in land, although *Watson v. Commissioner* covered the sale of an undivided interest in the fee. In none of

the cases was the question of the quantum or degree of interest in the land discussed. The controversy centered around the proposition of whether the immature crop was primarily held for sale to customers in the ordinary course of business and was therefore excluded. Such was the ruling in *Watson*.

In *McCoy v. Commissioner* and in *Owen v. Commissioner* this argument was rejected upon the theory that the law of the State determined the status of the crop, and both the law of Kansas and the law of Florida regarded growing crops as part of the land, which would pass with a conveyance of the land or an interest therein, unless specifically reserved. Both of these cases refer to a sale of the land and use the term "land" and the term "real estate" interchangeably.

California has the same rule, namely, crops until severed are a part of the land and pass with the transfer of any estate in land unless specifically reserved. The Congressional Debates and Committee Reports indicate that Congress considered both of these views and adopted the view, contrary to the ruling of the Commissioner, that if the crop was sold in a transaction the character of which would include the crop, except for a reservation, then there was a single transaction and it was improper to segregate the crop from the land. That is the plain meaning of Section 117 (j) (3). There is no additional language in the section to indicate that the estate in the land must be of any particular quantity or degree of dignity. The California cases cited in the Court's

Memorandum do not support the proposition for which they were cited, to-wit:

“The following citations from the State of California indicate that leases or estates for years do not come within the term ‘land’ ”

Kreling v. Walsh, 77 C.A. 2d 821, does not discuss “land” in any way; it merely makes the statement that a leasehold estate in land is a chattel real. On the contrary, it affirms plaintiff’s position that a leasehold estate is an estate in land.

Jeffers v. Easton, 113 Cal. 345, at 351, is directly against the contention for which it is cited, and it is direct authority for the proposition that an assignment of a lease is in effect a “sale” of a leasehold estate in land. Consider the following language:

“Counsel for appellants argued the case mostly upon the theory that the relation of landlord and tenant existed between the plaintiffs and the corporation respondent. But there was no such relation. The assignment was of the whole term; there was no underletting—no interest left in the assignors; and the relation was simply that of seller and purchaser.”

And, further:

“There is a marked difference between *things real* and an interest or *estate* in things real; the nature of the thing itself, therefore, does not determine the character of any particular estate that may exist in it, whether personal or real, but the extent and duration of the estate.”

The Opinion correctly approaches the problem of attempting to look to the State of California for a

definition of "land" in the absence of a specific definition thereof in the Revenue Act, and the California definition of land is "the solid material of the earth," as is noted by the Opinion, and has nothing whatsoever to do with the estate by which the land may be held. Whatever the estate in land may be, it is a property right in land, whether it be considered a chattel real or real property in the light of the old Common Law rule.

§654 of the Civil Code provides:

"Property, what. The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this code, the thing of which there may be ownership is called property."

§658 provides:

"Definition of real property; severance by agreement.

Real or immovable property consists of:

1. Land;
2. That which is affixed to land;
3. That which is incidental or appurtenant to land;
4. That which is immovable by law; except that for the purposes of sale, emblements, industrial growing crops and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code regulating the sales of goods."

§659 provides:

“*Land.* Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance.”

§660 provides:

“*Definition of fixtures: severance by agreement.* A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; . . .”

Thus it will be seen that California adopted the rule that *growing crops are a part of the “land”*, whatever the estate in land may be; and, further, ownership in land is the right of one or more persons to possession and use of it to the exclusion of others. The plaintiff at the time of this transaction had the right of exclusive possession and use, to the exclusion of others, of the properties in question; it therefore had an interest in the land which it could sell with the crops.

Decisions under the Revenue Act have held that the assignment of a leasehold estate is a sale, and is entitled under the Act to treatment as such.

In *Sutliff v. Commissioner*, 46 B.T.A. 466, Sutliff, holding a leasehold estate on property the fee of which was owned by his son, sold the lessor’s estate and the lessee’s estate to Avis. Sutliff, the lessee, reported the sale of his leasehold estate as a capital gain, which was challenged by the Commissioner. The Court stated:

“From the evidence before us we are unable to find that the petitioner cancelled his lease or that

the amount received by him from the sale of the property was anything other than consideration received by him through the sale of his leasehold interest."

And, further:

"The petitioner herein was not the owner of the fee, nor was the amount in controversy received by him from his lessee. After the sale of his lease he no longer owned any interest in the property."

And:

"The lease was an asset in the hands of the petitioner and, we think, comes within the definition of capital assets as contained in Section 117 of the applicable Act. Therefore, the gain realized by the petitioner from the sale of the lease was capital gain within the meaning of that section of the Act."

In *Golensky v. Commissioner*, 200 Fed. 2d 72, a tenant in possession for a consideration vacated and surrendered the premises before the date at which his lease expired, and the question was presented, was the consideration received for this surrender a "sale or exchange" so as to allow the tenant to pay income upon a capital gain under Section 117 of the Code, and the Court stated:

"After the tenant had transferred his lease to a third party at a profit, the resulting gain would be subject to capital gains treatment if other conditions were complied with."

And, further:

“Undoubtedly there is a cancellation of a lease when a tenant voluntarily surrenders the premises to a landlord in accordance with an agreement, but the fact that a cancellation occurs does not negative the fact that the transaction may constitute a sale. A lease is certainly property, although admittedly it is not an estate at freehold as that term was used in the Common Law. This property was transferred by the then owner to another for a stipulated price, which was paid. That would seem to constitute a sale unless there is some limiting requirement that nothing can be sold except a tangible chattel, which is not the case.”

And, further:

“If the transaction fits the legal requirements for a sale we see no reason for specific mention of it among a list classifying as a sale that which would not ordinarily be regarded as such a transaction.”

It is submitted that the Opinion of the Court is unrealistic in interpreting the Congressional intent in reading into those proceedings a condition not discussed. Nowhere in the Committee Reports or Congressional Debates is there is a reference to the character of an estate in land which was required as a prerequisite to capital gains on crops. The absence of such a discussion itself is persuasive, for certainly skilled senators and representatives must have been cognizant of the practice which has existed for centuries, dating back into the Common Law, of holding

land under leasehold tenure. It is safe to say that more land is farmed under lease tenure than under freehold, although the writer has no specific percentages at hand.

Yet Congress was concerned with sales of "unharvested crops" period, not "unharvested crops on fee land."

One further observation might be made in respect to the following portion of the Court's Opinion:

"It is my view that the phrase 'if the crop and the land are sold' clearly means the ownership of the land and does not mean 'if the crop and the right to the use of land are sold.'"

Yet the section is not limited to "sold." The section reads: "If the crop and the land are sold *or exchanged* . . . the crop shall be considered as property used in the trade or business."

By the transfer of the leases has not the right to use the land been exchanged? And the word "exchange" by no stretch of the imagination can be required to have the dignity of a specified form of tenure as a prerequisite to its effectiveness. Certainly the right and title to the crop and the right to the possession of the land was exchanged as a result of this transaction.

CONCLUSION.

It is therefore respectfully submitted that the Conclusions of Law and Judgment based upon the Findings of Fact are erroneous and that the Judgment should be entered in favor of plaintiff as prayed for.

Dated, Bakersfield, California,

June 24, 1958.

CONRON, HEARD & JAMES,
By CALVIN H. CONRON, JR.,
Attorneys for Appellant.

**In the United States Court of Appeals
for the Ninth Circuit**

BIDART BROS., A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**On Appeal from the Judgment of the United States District
Court for the Southern District of California**

BRIEF FOR THE APPELLEE

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15950

BIDART BROS., A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeal from the Judgment of the United States District
Court for the Southern District of California

BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the District Court (R. 18-30) is reported at 157 F. Supp. 373.

JURISDICTION

The taxpayer filed its income tax return for the fiscal year ending April 30, 1952, within the time required and paid the tax shown thereon. Thereafter the Commissioner of Internal Revenue made a deficiency assessment in the amount of \$107,258.90 which was also paid. A timely claim for refund of the deficiency payment was filed on or about April 13, 1956 (R. 5-9), and was rejected by the Commissioner

on February 4, 1957 (R. 9). Within the time provided in Section 3772 of the Internal Revenue Code of 1939 and on March 11, 1957, suit for refund was instituted by a complaint filed in the District Court. (R. 1-9, 32-34.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. Judgment was entered against the taxpayer on January 10, 1958. (R. 35.) Notice of appeal to this Court was duly filed on February 13, 1958. (R. 35-36.) This Court has jurisdiction under 28 U.S.C., Section 1291.

QUESTION PRESENTED

The taxpayer was lessee of several parcels of land and sold such leases during the taxable years along with the unharvested crops on the leased land. The question is whether the net profit from the sale of such crops must be taxed as ordinary income as the District Court held or can be taxed as capital gain under Section 117(j) of the Internal Revenue Code of 1939, as the taxpayer contends.

STATUTE AND OTHER AUTHORITIES

The pertinent provisions of the statute and other authorities appear in the Appendix, *infra*.

STATEMENT

The facts as found by the District Court are as follows (R. 31-34):

The taxpayer is a California corporation having its principal place of business at Saco, Kern County, California. It filed a timely income tax return for its fiscal year ending April 30, 1952 (the taxable year

involved here), and paid the tax shown thereon. (R. 31-32.)

The taxpayer was the lessee of several parcels of land upon which it grew a variety of crops such as hay, cotton and seed alfalfa. The leased lands had been held by the taxpayer for a period in excess of six months when during the fiscal year involved here, it sold its leases on such land together with the unharvested crops thereon. Such sale was made to Wheeler Farms, a partnership. (R. 32.)

In its federal income tax return for such fiscal year, the taxpayer reported the sale of the leases and the unharvested crops on the leased land as a single transaction and treated the entire gain from this sale as a long term capital gain. The gain on the leases amounted to \$244,925.73 and on the unharvested crops \$237,954.56. The taxpayer also reported gain from harvested crops which it treated as ordinary income (R. 32-33.)

The Commissioner accepted the taxpayer's treatment of the gain on the leases and on the harvested crops but did not accept the taxpayer's treatment of the unharvested crops as capital gain. Accordingly the Commissioner determined a deficiency in the amount of \$107,258.90. That amount was then paid by the taxpayer and a claim for refund was filed. Such claim was rejected by the Commissioner on February 4, 1957. (R. 32-34.)

The District Court decided that the taxpayer had not sustained its burden or proving that the gain from the sale of unharvested crops on leased land is within the provisions of Section 117(j)(3) of the

Internal Revenue Code of 1939 and that the taxpayer is not entitled to any refund of taxes paid for the fiscal year ending April 30, 1952. Accordingly the District Court held that the taxpayer's complaint be dismissed with prejudice. (R. 34-35.)

SUMMARY OF ARGUMENT

During the taxable year here, the taxpayer sold unharvested crops to the same partnership and at the same time it sold its leases on the land where the crops were growing. Taxpayer contends that it can treat the gain realized from the sale of crops as capital gain under 1939 Code Section 117(j) (3). But the District Court held that such gain must be taxed as ordinary income because the sale of the lease did not constitute a sale of land and that a sale of land was required by the statutory provision relied on. We submit that the court's decision is a reasonable and proper interpretation of Section 117(j) (3).

As that section does not define the terms "land" and "sale of land", they must be given their ordinary and commonly accepted meaning, and that is the meaning which the District Court did give them. In so defining them the court correctly pointed out that since there is no reference in the section to leases of land or to various kinds of land tenure, the section must be interpreted as referring to a sale by one who is the owner, and not to an assignment of a lease by a lessee.

The Regulations promulgated under Section 117 (j) (3) support the decision here for they state specifically that a leasehold or estate for years is not

“land” for the purposes of this section. The same regulation was again issued after Congress included a section corresponding to Section 117(j) (3) in the Internal Revenue Code of 1954. This regulation is a reasonable interpretation, and should be given weight as the contemporaneous construction by the officials charged with the administration of the revenue laws.

The Congressional Committee reports relative to Section 117(j) (3) do not define or explain the terms therein which are under consideration here, and such reports do not support taxpayer's contention. These reports do indicate that Section 117(j) (3) was enacted because of a conflict in the cases pertaining to sales of unharvested crops, but it is significant that in each case referred to the crops had been sold simultaneously with a sale of land by the owner thereof. Thus in no case brought to the attention of Congress was there a sale of a lease by a lessee, and there is nothing to indicate that in enacting Section 117(j) (3) Congress gave any consideration to the precise issue here.

ARGUMENT

The District Court Correctly Held That the Gain Realized from the Sale of Taxpayer's Unharvested Crops Should Be Taxed As Ordinary Income

During its fiscal year ending April 30, 1952, the taxpayer, a California corporation, sold the leases which it held on several parcels of farm land together with the unharvested crops on such land to Wheeler Farms, a partnership. Taxpayer treated the gain from the sale of the unharvested crops, as well as that

realized from the sale of the leases, as long term capital gain, and contends that it was authorized to do so by Section 117(j) of the Internal Revenue Code of 1939 (Appendix, *infra*). But the Commissioner held that the sale of leases can not be construed as a sale of land within the meaning of Section 117(j). Thus he determined that the portion of the gain attributable to the sale of the crops should be taxed as ordinary income, and the District Court decided that the Commissioner's determination was correct.

A. *Provisions of Code Section 117(j)*

Paragraph (2) of Section 117(j) provides that if, during the taxable year, the recognized gains from the sales of "property used in the trade or business" exceed the recognized losses from such sales, such gains "shall be considered as gains" from the sales of capital assets;¹ and Paragraph (1) provides that for the purposes of Section 117(j) the term "property used in the trade or business" shall include, among other things listed, (1) property used in trade or business of a character which is subject to depreciation and has been held for more than six months, (2) real property which is used in trade or business and held for more than six months, but which is not the kind includible in an inventory, or is not property held by the taxpayer primarily for sale in the ordi-

¹ Prior to the amendment of the Code by the addition of Section 117(j) the only property to which capital gains treatment could be given was "capital assets" and such assets were and still are defined in Code Section 117(a) as excluding property used in trade or business.

nary course of the trade or business and (3) *unharvested crops to which Paragraph (3) is applicable*. Paragraph (3) of Section 117(j) was added to the 1939 Code in 1951 and provides:

Sale of land with unharvested crop.—In the case of an unharvested crop on land used in the trade or business and held for more than 6 months, if the crop and the land are sold or exchanged * * * at the same time and to the same person, the crop shall be considered as “property used in the trade or business.”

From the above statutory provisions it is apparent that the gain realized from the sale of unharvested crops can be considered as capital gain only when the conditions of Section 117(j)(3) have been met and these conditions are set forth in clear and unambiguous language. First there is the title of paragraph (3) indicating its limited scope, namely, that it refers only to *a sale of land with unharvested crop*. Next there is the provision therein stating that an unharvested crop on land which has been used in the trade or business and which has been held for more than six months may be treated as property used in trade or business (and so subject to capital gains treatment) *if the crop and the land are sold² at the same time and to the same person*. We submit that the language in the “if” clause in this provision is so

² As taxpayer points out (Br. 29) the above clause does use the words “sold or exchanged” but it is admitted the transaction here was a sale and we do not see that there is anything significant about the use of the word “exchanged” or anything that can be said relative to it which is helpful to the taxpayer here.

plain and simple that there should be no doubt as to its meaning or that the District Court has interpreted it correctly but it must be analyzed further since the taxpayer's brief presents a long and involved argument in attempting to show that the sale of the leases here should be treated as a sale of land.

There are no cases involving the precise issue here, and the statute contains no definition of the term "land" which is the key word. Thus we must be guided by the long established rule that the language of a statute is to be given its usual and ordinary meaning for in the absence of any definitions, it must assume that Congress intended the words it used to be given their ordinary and commonly accepted meaning. *Helvering v. Flaccus Leather Co.*, 313 U.S. 247, 249; *Old Colony R. Co. v. Commissioner*, 284 U.S. 552, 560. In applying this rule of statutory construction here, the District Court pointed out that the ordinary meaning of "land" and its definition under the law of California are the same and then gave the following definitions (R. 24):

Webster's New International Dictionary, 2d edition, defines land as "the solid part of the surface of the earth as distinguished from water constituting a part of such surface". Black's Law Dictionary, 4th edition (1951) states that "Land, in the most general sense, comprehends any grounds, soil, or earth whatsoever; as meadows, pastures, woods, moors, waters, marshes, furzes and heath. Co. Litt. 4a". Section 659 of the California Civil Code states that "Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock or other substance."

Taxpayer agrees (Br.11, 19) that the term "land" refers to the solid substance of the earth but asserts that the District Court's opinion overlooks that such substance may be possessed in different ways, from a tenancy at sufferance up through more permanent degrees of land tenure. This contention which sets forth the various intricacies of land tenure was well answered by the District Court when it said (R. 23, 25):

Counsel for the plaintiff argues with great earnestness that Congress in enacting paragraph 3 was concerned only with land tenure or use, and not land ownership. It is to be noted that the words "land tenure", "land use", "use of land", "lease", "real property" or similar expressions do not appear in the statute. The critical phrase in the statute is "if the crop and the land are sold * * *". * * *

* * * * *

It is my view that the phrase "if the crop and the land are sold" clearly means the ownership of the land and does not mean "if the crop and the right to the use of land are sold", as urged by the plaintiff.

This meaning is not changed by the clause in the statute which reads "in the case of an unharvested crop on land used in the trade or business and held for more than 6 months". That clause is modified by the clause "if the crop and the land are sold".

The District Court also explained (R. 24-25) that in California leases or estates for years do not come within the term "land" but are treated as personal property. See *Dabney v. Edwards*, 5 Cal. 2d 1, 53 P.

2d 962; *Potts Drug Co. v. Benedict*, 156 Cal. 322, 104 Pac. 432; *Jeffers v. Easton Eldridge & Co.*, 113 Cal. 345, 45 Pac. 680; *Kreling v. Walsh*, 77 Cal. App. 2d 821, 176 P. 2d 965; *Santa Barbara v. Maher*, 25 Cal. App. 2d 325, 77 P. 2d 306. Taxpayer asserts (Br. 23-24) that these California cases do not support the proposition for which they were cited by the District Court but we do not agree. However even if they were not correctly interpreted, it does not follow that the court's decision is wrong or that it was based entirely on California law. Instead, we think it is apparent that in interpreting Section 117(j) (3), the District Court was primarily influenced by the ordinary and commonly accepted meaning of the language used therein. Certainly the District Court would have reached the same result without considering California law.

In this connection we point out that it is doubtful how much, if any, consideration should be given to local law in cases like this one. Obviously to interpret Section 117(j) (3) properly, the terms "land" and "sale of land" should be given the same definitions throughout the United States. Moreover, as we have already indicated, in the absence of statutory definitions, those terms must be given their usual and ordinary meaning and we submit that is the meaning which the District Court adopted here. Certainly it is fair to say that if the average person should be asked to explain what is meant by a sale of land he would answer that it is the disposition of the actual soil or substance of the earth by one who is the owner and holds fee title thereto; and that he would not treat an

assignment of a lease by a lessee as a sale of land for such lessee is not commonly thought of as an owner or as a person in a position to sell the land he has leased.

B. Regulations applicable to Section 117(j)(3)

After the enactment of Section 117(j)(3) late in 1951, Section 29.117-7(d) of Treasury Regulations 111 (Appendix, *infra*) was amended on February 3, 1953, by T.D. 5980, 1953-1 Cum. Bull. 65, and provides so far as pertinent here, as follows:

(d) *Unharvested crops*.—The conditions referred to in (a)(1)(v) above are: (1) the unharvested crop is on land which is “section 117(j) property”, as defined in (a)(3) above, and such land has been held for more than six months; (2) such crop and such land are sold, exchanged, or converted at the same time and to the same person; * * * *A leasehold or estates for year is not “land” for the purpose of this section.* (Italics supplied.)

In view of the last sentence in the above regulation, it is evident that the decision of the District Court is entirely in accord with that regulation, and from what we have already said under Subdivision A, it is equally apparent that the regulation is a reasonable and proper interpretation of Section 117(j)(3). Consequently weight should be given to the regulation for as this Court stated in *Gray Line Co. v. Granquist*, 237 F. 2d 390, 394, administrative determination should govern where it is neither arbitrary nor unreasonable.

This Court's statement in the *Gray Line Co.* case is in accord with many other cases holding that Regulations which are not unreasonable or plainly inconsistent with the statutory purpose should be given effect as contemporaneous construction by the agency which Congress has charged with the enforcement of the Act. *Helvering v. Reynolds Co.*, 306 U.S. 110, 115; *Citizens Nat. Trust & S. Bank of Los Angeles v. United States*, 135 F. 2d 527, 529 (C.A. 9th); *Commissioner v. Plestcheeff*, 100 F. 2d 62 (C.A. 9th).

We are aware, of course, that the above regulation has been in effect for only five years. However it is significant that the Treasury Department has subsequently reissued the same regulation twice. See Section 39.117(j)-1(d) of Regulations 118, promulgated under the 1939 Code and applicable to years beginning after December 31, 1951, and Section 1.1231-1 of Treasury Regulations on Income Tax issued under the 1954 Code.

Attention is also called to the fact that the provisions of Section 117(j)(3) of the 1939 Code are substantially the same as Section 1231(b)(4) of the 1954 Code (26 U.S.C. 1952 ed., Supp. II, Sec. 1231) and that the 1954 Code was not enacted until more than eighteen months after the regulation on which we rely here was promulgated. Thus we think it may be assumed that Congress had knowledge of the construction placed upon Section 117(j)(3) by the officials charged with the administration of the revenue laws and that if Congress had considered such construction erroneous, it would not have enacted the same provision as Section 1231(b)(4) of the 1954

Code. Since Congress failed to change this statutory provision, we may assume that it did not find Section 29.117-7(d) of Regulations 111 inconsistent with the intent of the statute. See *Mass. Mutual Life Ins. Co. v. United States*, 288 U.S. 269, 273. For these reasons the regulation may be accepted as a proper interpretation of Section 117(j) (3).³

C. Committee reports applicable to Section 117(j)(3)

In attempting to show the incorrectness of the District Court's decision, taxpayer has relied (Br. 13-17) on the Congressional Committee reports relating to Section 117(j) (3) but as we shall now point out those reports do not support the taxpayer's contention.

The District Court also discussed these reports and has set out two of them in its opinion. (R. 26-28.) In this connection the District Court explained that it had considered the reports "Notwithstanding my belief that the language of the statute is clear" (R. 25); and in conclusion stated "I find nothing in the Committee Report which causes me to change my view as to the plain meaning of the statute" (R. 28-29). The District Court's analysis of the committee reports is clearly correct for there is absolutely

³ In contending that the above regulation should not be applied here taxpayer has objected particularly to its being given retroactive effect, as in this case, but the dates given by taxpayer (Br. 11) show that it is in error in stating that the regulation was retroactive for a three year period. However that is not material since the regulation is merely the construction placed on the statute by the administrative officials charged with its enforcement and has not taken away any rights granted by Congress.

nothing in the two reports appearing in the court's opinion or in the supplemental report of the Finance Committee set out in the Appendix, *infra*, to indicate that the court's interpretation is contrary to the intent of Congress.

It will be seen that while these reports contain a few references to "land" and "sale of land" they do not define those terms nor give any indication that such terms are to be given the meaning contended for by the taxpayer here. There is a statement in the supplemental report to which we referred above that the privilege of treating unharvested crops as property used in trade or business is granted *under certain conditions*. Thus it is clear that such crops can not always be so treated and we think it is evident that the conditions were not met here.

As the District Court pointed out (R. 21, 28) and as the first report of the Finance Committee indicates (R. 26), the provision appearing in Section 117 (j) (3) was added to the 1939 Code because of the conflict in certain cases and also because of a ruling of the Bureau of Internal Revenue. The latter stated that the gain from the sale of unharvested crops should be treated as ordinary income although the sale was made simultaneously with the sale of the land on which the crop was growing and was made to the same person. Among the cases just referred to was one by this Court in *Watson v. Commissioner*, 197 F. 2d 56, affirmed, 345 U.S. 544, which agreed with the Bureau's ruling.⁴ But in view of the enact-

⁴ As Section 117(j) (3) was enacted before the Supreme Court's decision was rendered in the *Watson* case, *supra*, it

ment of Section 117(j) (3), it is not necessary now to consider what the various cases held. It is however important to note that in all of them the simultaneous sales of unharvested crops and land had been made *by the owners of the land* and this is not denied by the taxpayer. Thus no case brought to the attention of Congress involved a sale of a lease by a lessee. Consequently the specific issue which taxpayer raises here had not been raised in any of the cases referred to and there is no evidence that Congress gave any consideration to this issue.

As further support for its contention taxpayer cites (Br. 14-15) statements made by Senators Humphrey and Holland on the floor of the Senate when the provision in Section 117(j) (3) was being debated but there is nothing in their statements to support taxpayer's contention. Moreover, it is a recognized rule of statutory construction that statements made in Congressional debates are not considered as authoritative as Committee reports. Particularly is that true when the statements are made by Senators who are not members of the Committee in charge of the proposed legislation. The Congressional Directory for 1951 (the year in which the statutory provision involved here was enacted) shows

was brought to the Supreme Court's attention although it could be given no retroactive effect. But in commenting on it, the Supreme Court pointed out (p. 548) that it embodied an affirmative statement by Congress which was needed in order to allow gain from the sale of an unharvested crop to be treated as capital gain. The Supreme Court also stated that the addition of Section 117(j) (3) to the Code emphasized the point that the question was one of federal law.

that neither of the above Senators was on the Finance Committee which is, of course, the one reporting on revenue matters.

Taxpayer also refers (Br. 14) to a statement by Senator George who was chairman of the Finance Committee. While a statement by a Senator in that capacity is entitled to more weight than that made by the other Senators, it will be seen that what Senator George said does not help the taxpayer for it fails to show that Section 117(j)(3) should be given an interpretation different from that adopted by the District Court.

CONCLUSION

The decision of the District Court is correct and should be affirmed.

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July, 1958.

APPENDIX

Internal Revenue Code of 1939:

SEC. 117. CAPITAL GAINS AND LOSSES.

* * * *

(j) [As added by Sec. 151(b), Revenue Act of 1942, c. 619, 56 Stat. 798, and amended by Sec. 127, Revenue Act of 1943, c. 63, 58 Stat. 21, Sec. 210(b), Revenue Act of 1950, c. 994, 64 Stat. 906, and Secs. 323, 324 and 325, Revenue Act of 1951, c. 521, 65 Stat. 452] *Gains and Losses from Involuntary Conversion and from the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term “property used in the trade or business” means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or (C) a copyright, a literary, musical, or artistic composition, or similar property, held by a taxpayer described in subsection (a)(1)(C). Such term also includes timber or coal with respect to which subsection (k)(1) or (2) is applicable and unharvested crops to which

paragraph (3) is applicable. Such term also includes livestock, regardless of age, held by the taxpayer for draft, breeding, or dairy purposes, and held by him for 12 months or more from the date of acquisition. Such term does not include poultry.

(2) *General rule.*—If, during the taxable year, the recognized gains upon sales or exchanges or property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion * * * of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. * * *

(3) *Sale of land with unharvested crop.*—In the case of an unharvested crop on land used in the trade or business and held for more than 6 months, if the crop and the land are sold or exchanged (or compulsorily or involuntarily converted as described in paragraph (2)) at the same time and to the same person, the crop shall be considered as “property used in the trade or business.”

(26 U.S.C. 1952 ed., Sec. 117.)

Treasury Regulations 111, promulgated under Internal Revenue Code of 1939:

Sec. 29.117-7 [as amended by T.D. 5980, 1953-1 Cum. Bull 65]

(d) *Unharvested crops.*—The conditions referred to in (a) (1) (v) above are: (1) the un-

harvested crop is on land which is "section 117 (j) property", as defined in (a) (3) above, and such land has been held for more than six months; (2) such crop and such land are sold, exchanged, or converted at the same time and to the same person; and (3) no right or option is retained by the taxpayer, at the time of the sale, exchange, or conversion, to reacquire, directly or indirectly, the land (other than one customarily incident to a mortgage or other security transaction). The length of time for which the crop, as distinguished from the land, has been held is immaterial. A leasehold or estate for years is not "land" for the purpose of this section.

S. Rep. No. 781, Part 2, 82d Cong., 1st Sess., pp. 42-43 (1951-2 Cum. Bull. 545, 574):

SECTION 323. SALE OF LAND WITH UNHARVESTED CROP

This section, for which there is no corresponding provision in the House bill, amends section 117(j) of the code (relating to sale, exchange, or conversion of property used in the trade or business) to provide that, under certain conditions, an unharvested crop shall be considered as property used in the trade or business. Whether gain or loss from the sale, exchange, or conversion of such a crop will, as a result of this amendment, be treated as gain or loss from the sale or exchange of a capital asset held for more than 6 months will depend upon the application of section 117(j) to that and other transactions of the taxpayer.

* * * *

Subsection (a) (2) adds a new paragraph (3) to section 117(j) to provide that when an un-

harvested crop on land used in the trade or business and held for more than 6 months is sold or exchanged (or compulsorily or involuntarily converted as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) with such land and at the same time and to the same person, such crop shall be considered as "property used in the trade or business." The length of time for which the crop, as distinguished from the land, has been held is immaterial.

* * * *

No. 15,950
United States Court of Appeals
For the Ninth Circuit

| | | |
|--|---|---|
| BIDART BROS., a corporation, vs. UNITED STATES OF AMERICA, | } | <i>Appellant,</i> <i>Appellee.</i> |
|--|---|---|

**Appeal from the United States District Court for the
Southern District of California,
Northern Division.**

Honorable Gilbert H. Jertberg, Judge.

APPELLANT'S CLOSING BRIEF.

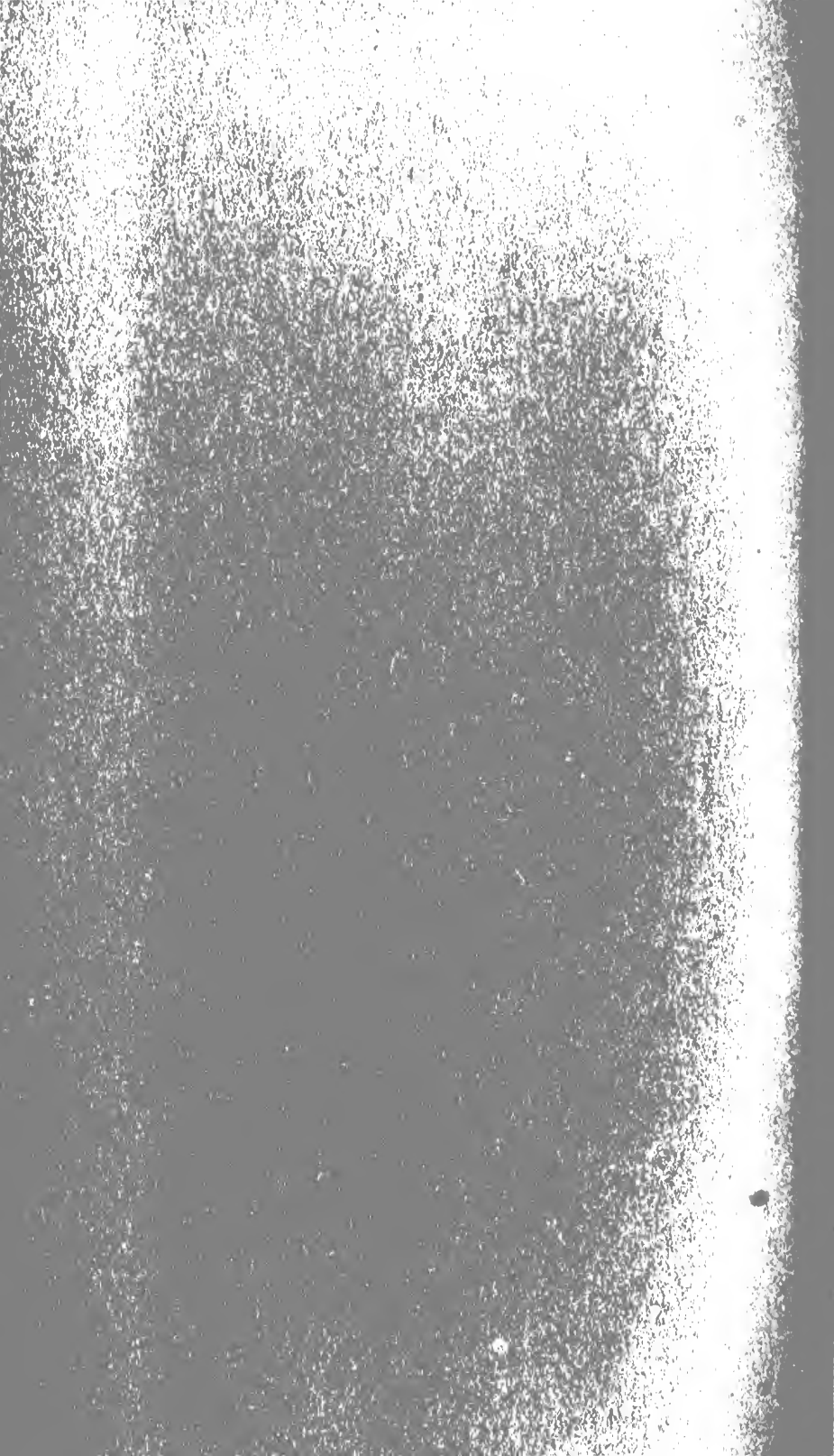
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FILED

AUG 25 1958

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No. 15,950

**United States Court of Appeals
For the Ninth Circuit**

BIDART BROS., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

**Appeal from the United States District Court for the
Southern District of California,
Northern Division.**

Honorable Gilbert H. Jertberg, Judge.

APPELLANT'S CLOSING BRIEF.

In closing this discussion appellant will reply to the position of the Government in the following manner:

1. Section 117 (j) (3) is not restricted to sales of fee land:

(a) Because such a construction singles out portions of the statute to the exclusion of others, in contravention to the rule of construction that all parts of a statute should be read together, and no part should be emphasized standing alone to the exclusion of the other portions of the statute.

(b) The Government's position in effect adds to the statute, in contravention to the rule of construction which prohibits this practice.

(c) The Government's construction is unreasonable in that it, without justification, segregates unharvested crops into two categories: (1) Those grown on fee lands, and (2) those grown on other lands.

(d) The position of the Government violates the Fourteenth Amendment to the Constitution of the United States by extending certain benefits to farmers who own their farms and denying them to others, even though all are engaged in the same profession or business, namely, that of tilling the soil for the purpose of growing crops.

2. The Treasury Regulation is contrary to the plain meaning and spirit of the Act and is void.

3. The problem at issue is one of tremendous importance in that it affects the farming industry as a whole, throughout the United States.

ARGUMENT.

POINT 1.

SECTION 117 (j) (3) IS NOT RESTRICTED TO SALES OF "FEE LAND".

It is submitted that a fair and reasonable reading of the section compels the conclusion that the section applies to all transactions involving a transfer of the right to occupy land and not merely to transactions

in which the "fee" title to land is sold. The section is directed not to an unharvested crop on fee land but to "an unharvested crop on land *used* in the trade or business and *held*¹ for more than six months". No plainer or more forceful language could be used to indicate the character or extent of tenure of ownership in the land required as a condition to bring the section into play. It is important, also, to note that prior to the adoption of Section 117 (j) (3) Section (j) (1) applied to "real property used in the trade or business held for more than six months."² The addition of (3) uses "land", not "real property".

The Government is singling out and giving undue stress to the phrase "if the crop and the land are sold", and is not attempting to construe the language of the statute as a whole. As stated in *Mertens, Law of Federal Income Taxation*, Volume 1, page 20:

"The legislative intent is to be drawn from the whole statute so that a consistent interpretation can be reached and no part shall perish or be allowed to defeat another. No provision of a statute stands alone but each must be read with the others bearing upon it."

¹The word "held" is the past tense and past participle of the verb "hold", which Webster defines as "to have and keep as one's own; to be in possession of; to occupy." While the word is broad enough to include title in fee it is by no means restrictive enough to apply only to a title in fee.

²It is important to note that throughout the Income Tax Law traditionally the division between long term and short term capital gain is the six-month period of time in which the property is held, and not the character or quality of the title to the property, and that this division applies to personal property as well as to real property.

In singling out the phrase "if the crop and the land are sold" the Government by implication contends "You've got to own full title to it before you can sell it". In other words, a tenant without title to earth, rocks, dirt, etc., which comprise "land", cannot engage in a transaction in which the land is sold. Grammatically and logically this premise is false. The word "sold" is the past tense and past participle of "sell", a transitive verb whose synonym is "to give up" and "deliver up", and which is defined by Webster as "to give up, deliver or exchange for money or its equivalent; to part with for a price". A tenant or any person having any degree of tenure in land may give it up, or part with it, for a price. Therefore the phrase in Section 117 (j) (3) "an unharvested crop on land used in the trade or business *and held for more than six months*" must be given full consideration in ascertaining the meaning of the phrase "if the land and the crop are sold".³

Furthermore, the construction contended by the Government violates the rule of construction which prohibits the Court from adding to a statute. To say that Section 117 (j) (33) is limited to sales of fee land is virtually to change the wording of the section

³The phrase "in the case of an unharvested crop on land used in the trade or business and held for more than six months" is an adjective phrase defining and limiting the type of crops with which the section is concerned. The phrase "if the crop and the land are sold, exchanged or involuntarily converted" is definitive of the conditions under which the unharvested crops before mentioned are considered property used in the trade or business under the Act. This is made clear by the accompanying grammatical diagrams of Section 117 (j) (3) set forth in Part VI of the Appendix.

as written by Congress.⁴ This the Court may not do.

Mertens, supra, on page 5 states:

"The duty of the Courts is limited to interpretation. They cannot legislate. The remedy for an unjust or ineffective law is corrective legislation. . . . The Courts cannot change a plain meaning by substituting another, indulge in speculation, graft upon the statute something not already there, or supply omissions."

Mertens, supra, at page 7 further states:

"It is well established that statutes should be reasonably interpreted in a practical and sensible light. In recent years, the Courts have not felt bound to apply slavishly the literal phrasing of statutes when the clearly indicated purpose of the Congress seems to require a broader or a narrower interpretation. Generally, a construction leading to hardship, injustice, . . . contradictions, absurdity, or sometimes merely to an unreasonable result, should be avoided unless the meaning is clear."

It is submitted that the construction contended for by the Government brings about hardship, injustice, confusion, contradiction, absurdity and a wholly unreasonable result, by segregating unharvested crops into two categories: (1) Crops grown on fee land, and, (2) other crops, instead of crops growing upon land held and used for less than six months, as distinguished from more than six months.

⁴The Government is in effect seeking to change that portion of the section which reads "if the crop and the land are sold" to read "if the crop and the land, title to which is held in fee simple, are sold".

There is no reasonable basis for discriminating between tenant farmers and fee land farmers.

Farmer A⁵ owns his land and starts to grow a crop. Farmer B⁶ leases his land and starts to grow the same crop. Both use the same seed, the same implements, and perform the same farming operations. Both sell their farms before their crops mature. Is there any reason why one should be allowed capital gains treatment on his crop and the other denied the same treatment?

Take another example. Farmer A starts ranching. Not having the money to buy, he leases, and, after a time prospers and buys additional acreage. He grows the same crops upon his leased land and upon his owned land, in identically the same manner. Then he decides to retire during a crop year and sells his leased land and his fee land to Rancher B at the same time and in the same transaction. Why should part of his crop be given capital gains treatment and part ordinary income treatment? Would it not be more consistent to give the statute a reasonable construction rather than one which leads to an absurdity?⁷

It is submitted that the Congressional Debates and Committee Reports indicate that it was never the

⁵In 1954 there were 2,744,708 full owner farmers. *Agricultural Census for 1954*, Vol. 2, published by Secretary of Agriculture.

⁶In 1954 in the United States there were 1,149,239 all tenant farmers. *Agricultural Census*, supra.

⁷In 1954 in the United States there were 868,180 part owner-part tenant farmers. *Agricultural Census*, supra.

intention of Congress to discriminate between fee owners and tenants, and against the tenants.

The controversy was presented to Congress by reason of a Treasury Department ruling to the effect that all growing crops were property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, and conflicting rulings thereon had grown up in the several Circuits. The argument before Congress was, give the farmer the same capital gains treatment that you give a merchant or any other business, and allow his crops capital gains treatment when the farmer sells his business (because growing crops are not customarily sold to customers in the ordinary course of the farming business), just as the merchant is allowed capital gains treatment on his property not held for sale to customers, if he sells his business.

A farmer is one who tills the soil for the purpose of growing crops,⁸ and it is obvious that Section 117 (j) (3) was designed for the benefit of the farmer, because it deals with his merchandise, namely, crops. The profession of farming is concerned not with land tenure, but with land cultivation, *irrespective of the form of tenure under which the land is held*. In fact, Webster associates farming more with tenancy than with ownership. A farmer is defined by him as:

“A tenant; a lessee; one who hires and cultivates a farm; a cultivator of leased land; one who earns his living by farming; one who cultivates

⁸*Agricultural Census*, supra.

a farm, whether a tenant or proprietor; a husband; an agricultural; one who tills the soil."

In the light of this definition, consider Senator Humphrey's remark:

"A farmer who disposes of property used in his business should not be taxed differently from the manufacturer or merchant who does the same thing."

Considered in this light, the fact that in the Congressional Debates and Reports no distinction was made between farmers who are owners and farmers who are lessees lends forcible emphasis to the conclusion that Congress was not concerned with the type of tenure of the farm, but rather with establishing the proposition that an unharvested crop was not property held primarily for sale to customers in the ordinary course of business, and for that reason should be entitled to capital gains treatment if disposed of with the farm.

The argument on pages 10 and 11 of the Government's brief that the average man "would not treat an assignment of a lease by a lessee as a sale of land for such lessee is not commonly thought of as an owner or as a person in a position to sell the land he has leased" loses all of its force when applied to a farm. Would not an average farmer think he was selling his farm if he transferred the land and unharvested crops to another, even though the land was leased?

The construction urged by the Government is subject to constitutional attack as being violative of the Fourteenth Amendment.

Legislative discrimination is objectionable if persons engaged in the same business are subject to different restrictions or given different privileges under the same conditions. *Butler-Newark Bus Lines v. Sinclair*, 34 F. 2d 780; *King v. Crowley*, 113 U.S. 703, 28 L. Ed. 1145.

It is an elementary principle that where the validity of a statute is assailed and there are two possible interpretations, one by which the statute would be unconstitutional and the other by which it would be valid, the Court should adopt the construction which would uphold it. It is the duty of Courts to adopt a construction of a statute that will bring it into harmony with the Constitution if its language will permit. The duty of Courts so to construe a statute as to save its constitutionality when it is reasonably susceptible of two constructions includes the duty of adopting a construction which will not subject it to a succession of doubts as to its constitutionality, for it is well settled that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubt upon that score. For example, the provisions of the Income Tax Law must be construed with an eye to possible constitutional limitations, so as to avoid doubts as to its validity. 11 Am. Jur. 725-730; *Lucas v. Alexander*, 279 U.S. 573, 73 L. Ed. 871, 61 A.L.R. 906.

POINT 2.

THE REGULATION, BEING CONTRARY TO THE CLEAR PROVISIONS OF THE SECTION, IS VOID.

The entire argument in respect to the construction of the statute supports the proposition that the Treasury Regulation runs squarely into the teeth of the statute in legislating "A leasehold estate or estates for years is not 'land' for the purpose of this section." Leasehold estates in land are subject to sale and the transactions are taxable. *Sutliff v. Commissioner*, 46 B.T.A. 466; *Golensky v. Commissioner*, 200 Fed. 2d 72.

The Government recognized that the sale of the leasehold estate involved in this case was taxable and allowed a capital gain upon the same because it was land used in the trade or business and held for more than six months. To say in one breath that the transaction is a sale of land and in another that it is not a sale of land is unrealistic and absurd.

The Government seeks to add force to its position by calling to the attention of this Court the fact that Section 117 (j) (3) of the 1939 Code was transplanted to Section 1231 (b) (4) of the 1954 Code after its regulation was in effect. This argument is recognized where regulations of long standing are involved and where their application is generally known. It has no force when applied to new regulations which have not been in existence long enough to be presumed to have been called to the attention of Congress. *Commissioner v. William Goldman Theaters, Inc.*, 348 U.S. 426, 99 L. Ed. 483; *Sampson v. U.S.*, 144 F.

Sup. 620. And it is of no force or effect if the regulation is void.

POINT 3.

THE SERIOUSNESS AND SIZE OF THE QUESTION INVOLVED.

Although the matter was called to the attention of the Court briefly in the Opening Brief (pages 20-30), the gravity of the question involved is brought into bold relief by the Secretary of Agriculture's compilation of statistics, the most recent of which appear in the 1954 Agricultural Census, excerpts of which are fully set forth in the appendix.

It will be seen that the Secretary disregards the form of land tenure in arriving at a "farm". He considers all the land under the control of one person or partnership as constituting one farm. Control may have been through ownership, or through lease, rental or cropping arrangement. (App., Part I.)

In 1954 there were 4,783,021 farms in the United States, covering 1,160,043,854 acres of tillable land. (App., Part II.)

Of the farms before mentioned 2,744,708 farms were operated by fee owners; 868,180 by "part owners"; 20,894 by managers; and 1,149,239 by tenants. (App., Part II.)

Of the acreages farmed 397,214,478 acres were farmed by fee owners; 472,464,635 by part owners; 100,002,885 by managers; and 190,361,856 by tenants. (App., Part IV.)

For the purposes of the problem before us part owners and tenants would be given ordinary income treatment, and fee owners capital gains treatment, under the Government's position. Managers would fall in either category. Percentage-wise approximately 65% of unharvested crops sold with the land would be denied capital gains treatment, with the result that the Congressional Act would become a farce, because it would apply only to approximately 34.2% of those intended to be covered. (App., Part IV.)

The tables in the appendix make similar comparisons for other years, commencing in 1880. No figures more recent than 1954 were available to the writer.

CONCLUSION.

It is submitted that a fair and reasonable reading of the Act shows on its face that it was intended to apply to the sale of unharvested crops on land used by the farmer in his business for at least six months, irrespective of the form of tenure, when the crops are sold with the land to the same person in the same transaction.

It is further submitted that even though the language be considered ambiguous the reasonable and rational construction consistent with the intent of Congress would reach the same result. The Treasury regulation is contrary to the language of the Act and the intent of Congress, and is void.

A judgment within our Constitutional framework which will bring justice to tenants and part owners,

representing 60% plus of the land upon which crops are grown in the United States, by giving them the same treatment given fee owners and fee land, should be entered.

Dated, Bakersfield, California,
August 12, 1958.

Respectfully submitted,

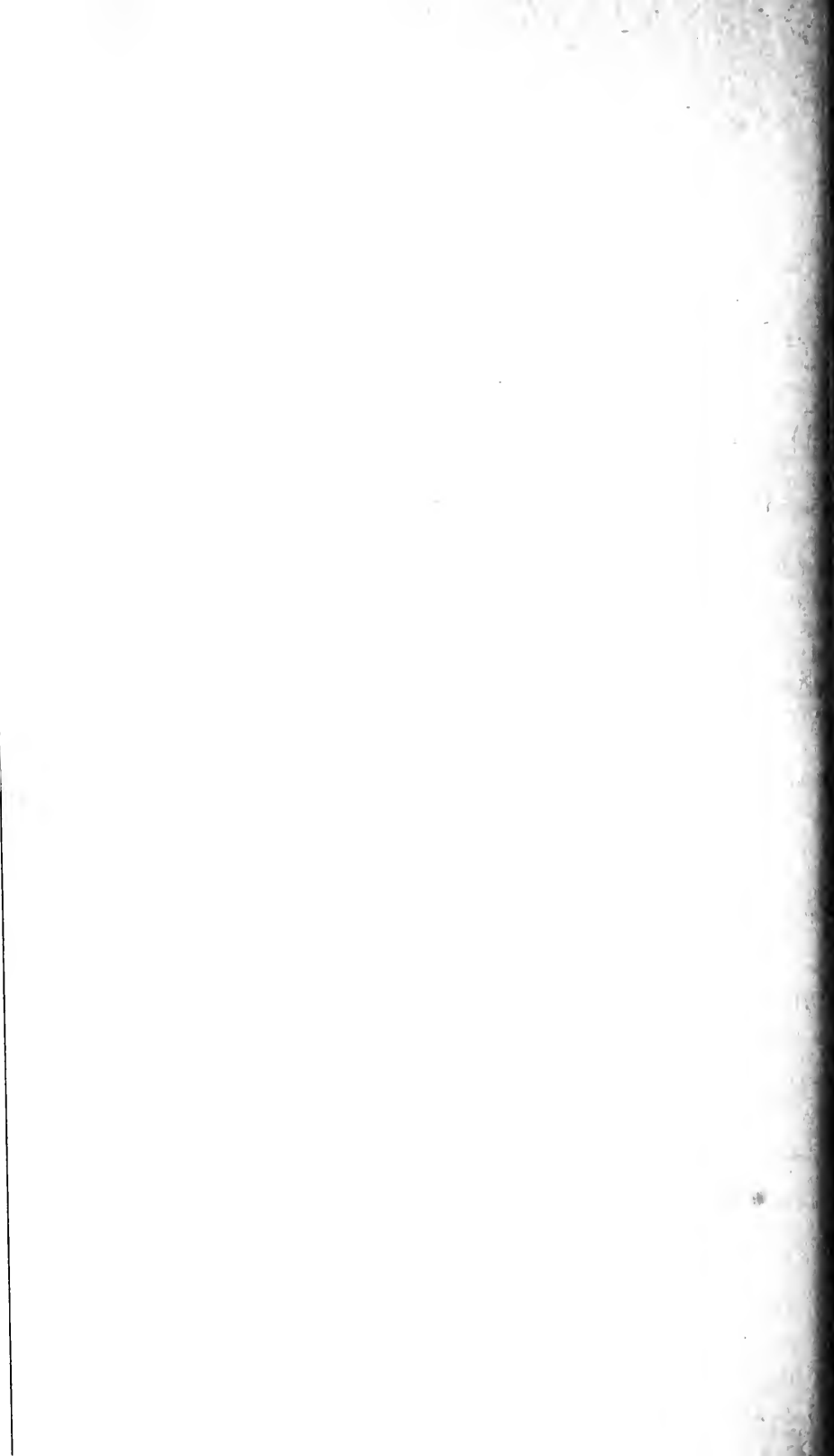
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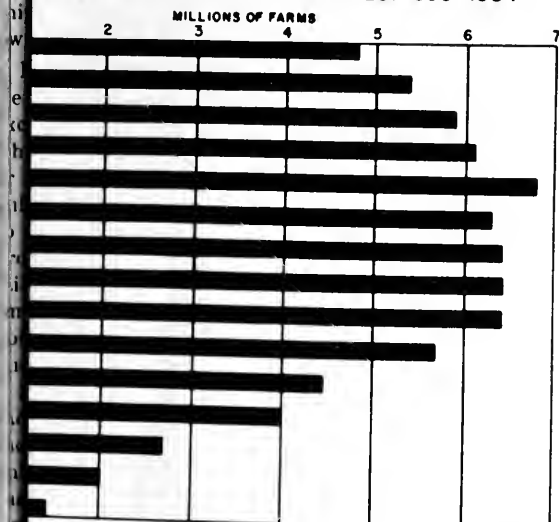
(Appendix Follows.)

Appendix.



FARMS AND LAND

OF FARMS IN THE UNITED STATES: 1850-1954



54C-001

not being used for agricultural purposes, and less of the total acreage in the place was used for purposes, the nonagricultural land in excess of the used for agricultural purposes was excluded from

In applying this rule, land used for crops, for grazing, and land rented to others was considered to be agricultural purposes. On the other hand, in these and was considered to be nonagricultural when it was pastured or wasteland.

Open range and grazing land used under Government grazing land was to be included as land in farms. Land was to be included as land rented from others. operated by grazing associations were to be reported the manager in charge.

Indian reservations used for growing crops, or for stock, was to be included as farm land. Land in Indian not reported by individual Indians or not rented to was to be reported in the name of the cooperative land. Thus, in some instances, the entire reservation was reported as one farm.

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FARMS AND LAND

Farm.—All the land under the control of one person or partnership was included as one farm. Control may have been through ownership, or through lease, rental, or cropping arrangement.

For the 1954 Census of Agriculture, places of 3 or more acres were counted as farms if the annual value of agricultural products, exclusive of home-garden products, amounted to \$150 or more. The agricultural products could have been either for home use or for sale. Places of less than 3 acres were counted as farms only if the annual value of sales of agricultural products amounted to \$150 or more. Places for which the value of agricultural products for 1954 was less than these minima because of crop failure or other unusual conditions, and places operated at the time of the Census for the first time, were counted as farms if normally they could be expected to produce these minimum quantities of agricultural products.

If a person had croppers or other tenants, the land assigned each cropper or other tenant was considered a separate farm, even though the landlord handled the entire holding as one operating unit in respect to supervision, equipment, rotation practice, purchase of supplies, or sale of products. Land retained by the landlord and worked by him with the help of his family and or hired labor was likewise considered a farm.

In the enumeration of Indian reservations, the enumerator was instructed to obtain a questionnaire for each individual Indian operating allotted or owned land in accordance with instructions for any persons having agricultural operations. He was also instructed to obtain a questionnaire for the land held jointly, or used cooperatively. Such cooperative groups included grazing associations, grazing districts, tribal farms, Indian schools, experimental or demonstration farms, and other administrative units.

If land under the control of one person or partnership was located in two or more counties, the entire holding was enumerated as one farm and in only one county.

Farms as defined for earlier Censuses.—For the 1950 Census of Agriculture, the definition of a farm was the same as for 1954. For the 1945 and earlier Censuses of Agriculture, the definition of a farm was somewhat more inclusive. From 1925 to 1945, farms, for Census purposes, included places of 3 or more acres on which there were agricultural operations, and places of less than 3 acres if the agricultural products for home use or for sale were valued at \$250 or more. For places of 3 or more acres, no minimum quantity of agricultural production was required for purposes of enumeration; for places of under 3 acres all the agricultural prod-

ucts valued at \$250 or more may have been for home use and not for sale. The only reports excluded from the tabulations were those taken in error and those with very limited agricultural production, such as only a small home garden, a few fruit trees, a very small flock of chickens, etc. In 1945, reports for places of 3 acres or more with limited agricultural operations were retained if there were 3 or more acres of cropland and pasture, or if the value of products in 1944 amounted to \$150 or more when there were less than 3 acres of cropland and pasture.

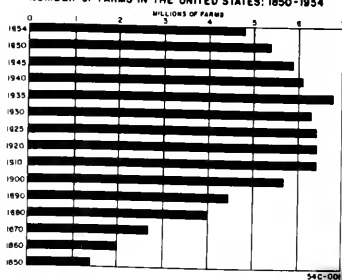
The definition of a farm in the 1920 and 1910 Censuses was similar to that used from 1925 to 1940 but was somewhat more inclusive. In those years farms of less than 3 acres with products valued at less than \$250 were to be included provided they required the continuous services of at least one person.

In the definition for 1900, there were no acreage or value of production limits. Market, truck, and fruit gardens, orchards, nurseries, cranberry marshes, greenhouses, and city dairies were to be included provided the entire time of at least one person was devoted to their care. For 1890, 1880, and 1870, no tract of less than 3 acres was to be reported as a farm unless \$500 worth of produce was actually sold from it during the year. For 1860, no definition was given the enumerators. In the Census of 1850, no acreage qualification was given in the definition, but there was a lower limit of \$100 for value of products.

Land in farms.—For 1954, the land in each farm, that is the land under the control of each farm operator or partnership, was determined by asking the number of acres owned, the acres rented from others or worked on shares for others, and the acres rented to others or worked on shares by others. The acres in the farm were obtained by adding the acres owned and acres rented from others or worked on shares for others, and subtracting the acres rented to others or worked on shares by others. In case of a managed farm, the person in charge was asked the total acreage managed for his employer. The acreage that was rented to others or cropped by others was subtracted from the total managed acreage.

The acreage designated "land in farms" includes considerable areas of land not actually under cultivation and some land not used for pasture or grazing. All woodland and wasteland owned by farm operators, or included in tracts rented from others, is included as land in farms unless such land was held for other than agricultural purposes, or unless the acreage of such land held by a farm operator was unusually large. If a place had 1,000 or more

NUMBER OF FARMS IN THE UNITED STATES: 1850-1954



acres of land not being used for agricultural purposes, and less than 10 percent of the total acreage in the place was used for agricultural purposes, the nonagricultural land in excess of the number of acres used for agricultural purposes was excluded from the farm area. In applying this rule, land used for crops, for pasture or grazing, and land rented to others was considered to be land used for agricultural purposes. On the other hand, in these large tracts, land was considered to be nonagricultural when it was woodland not pastured or wasteland.

Except for open range and grazing land used under Government permit, all grazing land was to be included as land in farms. Land used rent free was to be included as land rented from others. Grazing lands operated by grazing associations were to be reported in the name of the manager in charge.

All land in Indian reservations used for growing crops, or for grazing livestock, was to be included as farm land. Land in Indian reservations, not reported by individual Indians or not rented to non-Indians, was to be reported in the name of the cooperative group using the land. Thus, in some instances, the entire reservation was reported as one farm.

Table 1.—TENURE CLASSES INCLUDED IN THE REPORTS FOR EACH CENSUS, WITH THE NUMBER OF FARMS IN EACH CLASS: 1880 TO 1954

| 1954 | 1950 | 1945 | 1940 | 1935 | 1930 | 1925 | 1920 | 1910 | 1900 | 1890 | 1880 |
|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------------------------|--------------------------------|---|-----------------------------------|-----------------------------------|
| Full owners | Full owners | Full owners | Full owners | Full owners | Full owners | Full owners | Owners owning entire farms | Owners owning entire farms | Owners | Cultivated by owners 3,269,728 | Cultivated by owners 2,984,306 |
| 2,736,951 | 3,089,583 | 3,301,361 | 3,084,138 | 3,210,224 | 2,911,644 | 3,313,490 | 3,366,510 | 3,354,897 | 3,148,648 | | |
| | | | | | | | | | Owners and tenants ¹ 53,299 | | |
| Part owners | Part owners | Part owners | Part owners | Part owners | Part owners | Part owners | Owners hiring additional land | Owners renting additional land | Part owners | | |
| 856,933 | 824,923 | 640,502 | 615,039 | 688,867 | 656,750 | 554,842 | 558,580 | 593,825 | 451,376 | | |
| | | | | | | | | | Managers 59,085 | | |
| All tenants | All tenants | All tenants | All tenants | All tenants | All tenants | All tenants | All tenants | All tenants | Tenants | Rented | Rented |
| 1,167,885 | 1,444,129 | 1,858,421 | 2,361,271 | 2,865,155 | 2,664,365 | 2,442,608 | 2,454,804 | 2,354,676 | 2,024,964 | 1,294,913 | 1,024,601 |

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Table 3.—NUMBER OF FARMS, BY COLOR AND TENURE OF

[Data for 1954 are based on reports for only a sample of]

| Number of farms | | | | | | | | | | | | | Increase or decrease (-) | | |
|------------------------------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|--------------------------|-----------|-----------|
| Color and tenure of operator | 1954 | 1950 | 1945 | 1940 | 1935 | 1930 | 1925 | 1920 | 1910 | 1900 | 1890 | 1880 | Number | | |
| | | | | | | | | | | | | | 1950-1954 | 1945-1950 | 1940-1945 |
| 1 All farm operators | 4,783,021 | 5,382,162 | 5,859,169 | 6,096,799 | 6,812,350 | 6,288,648 | 6,371,640 | 6,448,343 | 6,361,502 | 5,737,372 | 4,564,641 | 4,008,907 | -599,141 | -477,007 | -237,630 |
| 2 Full owners..... | 2,744,708 | 3,089,583 | 3,301,361 | 3,084,138 | 3,210,224 | 2,911,644 | 3,313,490 | 3,366,510 | 3,354,897 | 3,201,747 | 3,148,648 | 3,148,648 | -344,875 | -211,778 | 217,223 |
| 3 Part owners..... | 868,280 | 824,923 | 660,502 | 615,039 | 688,867 | 656,750 | 554,842 | 558,580 | 593,825 | 451,376 | 3,269,728 | 2,984,306 | 43,257 | 164,421 | 45,463 |
| 4 Managers..... | 20,894 | 23,527 | 38,885 | 36,351 | 48,104 | 55,889 | 40,700 | 68,449 | 58,104 | 59,085 | | | -2,633 | -15,358 | 2,534 |
| 5 All tenants..... | 1,149,239 | 1,444,129 | 1,858,421 | 2,361,271 | 2,865,155 | 2,664,365 | 2,462,608 | 2,454,804 | 2,354,676 | 2,024,964 | 1,294,913 | 1,024,601 | -294,890 | -414,292 | -502,850 |
| 6 Cash..... | 160,131 | 212,790 | 402,175 | 514,438 | (NA) | 489,211 | 393,452 | 480,009 | 712,294 | 171,665 | 1,294,913 | 1,024,601 | -52,659 | -189,385 | -112,263 |
| 7 Share-cash..... | 165,241 | 193,109 | 317,858 | 278,605 | (NA) | (NA) | (NA) | 127,822 | 128,466 | | 1,294,913 | 1,024,601 | -27,868 | 55,251 | -140,747 |
| 8 Crop-share..... | 327,261 | 419,740 | | | | | | | | | | | | | |
| 9 Livestock-share..... | 111,154 | 115,277 | 694,928 | 815,799 | (NA) | (NA) | (NA) | 1,117,721 | 1,399,923 | 1,273,299 | 1,840,254 | 1,702,244 | -92,479 | -159,911 | -120,871 |
| 10 Croppers..... | 267,662 | 346,765 | 446,556 | 541,291 | 716,256 | 776,278 | 623,058 | 561,091 | | | | | -79,103 | -99,791 | -94,735 |
| 11 Other..... | 52,669 | 48,071 | 176,904 | 211,138 | (NA) | (NA) | (NA) | 116,161 | 113,993 | (NA) | (NA) | (NA) | 4,598 | -20,456 | -34,234 |
| 12 Unspecified..... | 65,121 | 108,777 | | | | | | | | | | | -4,256 | | |
| 13 White, total..... | 4,301,420 | 4,801,243 | 5,169,954 | 5,377,728 | 5,956,795 | 5,372,578 | (5) | 5,498,454 | 5,440,619 | 4,969,608 | (NA) | (NA) | -499,822 | -368,711 | -207,774 |
| 14 Full owners..... | 2,604,730 | 2,936,122 | 3,126,212 | 2,916,562 | 3,036,910 | 2,757,787 | (5) | 3,174,109 | 3,159,088 | 3,025,931 | (NA) | (NA) | -331,392 | -190,090 | 209,650 |
| 15 Part owners..... | 814,112 | 769,573 | 629,734 | 581,517 | 650,787 | 612,887 | (5) | 517,759 | 568,413 | 420,875 | (NA) | (NA) | 44,539 | 139,839 | 48,217 |
| 16 Managers..... | 20,236 | 23,056 | 38,263 | 35,634 | 46,914 | 52,767 | (5) | 66,223 | 56,560 | 57,261 | (NA) | (NA) | -2,820 | -15,207 | 2,629 |
| 17 All tenants..... | 862,342 | 1,072,492 | 1,375,745 | 1,844,015 | 2,222,184 | 1,954,137 | (5) | 1,740,363 | 1,676,558 | 1,465,541 | (NA) | (NA) | -210,150 | -303,253 | -468,270 |
| 18 Cash..... | 130,737 | 171,775 | 326,787 | 444,205 | (NA) | 387,834 | (5) | 1,373,835 | 1,467,851 | 1,477,002 | (NA) | (NA) | -40,638 | -155,412 | -117,418 |
| 19 Share-cash..... | 161,571 | 187,114 | 312,302 | 271,597 | (NA) | (NA) | (NA) | 119,395 | 113,843 | | (NA) | (NA) | -25,543 | 54,812 | -139,295 |
| 20 Crop-share..... | 255,787 | 321,413 | | | | | | | | | | | | | |
| 21 Livestock-share..... | 109,543 | 113,442 | 597,614 | 722,726 | (NA) | (NA) | (NA) | 936,564 | 1,026,372 | 988,539 | (NA) | (NA) | -69,626 | -162,759 | -125,112 |
| 22 Croppers..... | 107,416 | 148,708 | 176,260 | 242,173 | 347,848 | 383,381 | 278,736 | 227,378 | | | (NA) | (NA) | -41,292 | -27,552 | -65,913 |
| 23 Other..... | 40,862 | 36,333 | 142,782 | 163,314 | (NA) | (NA) | (NA) | 183,191 | 188,492 | (NA) | (NA) | (NA) | 4,509 | -12,342 | -20,532 |
| 24 Unspecified..... | 56,446 | 94,107 | | | | | | | | | | | -37,661 | | |
| 25 Nonwhite, total..... | 481,601 | 580,919 | 689,215 | 719,071 | 855,555 | 916,070 | (5) | 949,889 | 920,883 | 767,764 | (NA) | (NA) | -99,318 | -108,296 | -29,856 |
| 26 Full owners..... | 139,978 | 153,461 | 175,149 | 167,574 | 173,314 | 158,857 | (5) | 192,401 | 195,809 | 176,016 | (NA) | (NA) | -13,483 | -21,688 | 7,573 |
| 27 Part owners..... | 34,068 | 55,250 | 30,768 | 33,522 | 38,080 | 43,863 | (5) | 40,821 | 45,412 | 30,501 | (NA) | (NA) | 1,282 | 24,582 | -2,754 |
| 28 Managers..... | 658 | 471 | 622 | 717 | 1,190 | 1,322 | (5) | 1,544 | 1,824 | 1,824 | (NA) | (NA) | 1,071 | 1,155 | -95 |
| 29 All tenants..... | 286,897 | 371,637 | 482,676 | 517,256 | 642,971 | 710,228 | (5) | 714,441 | 678,118 | 559,239 | (NA) | (NA) | -86,760 | -111,039 | -34,586 |
| 30 Cash..... | 29,394 | 41,415 | 75,388 | 70,233 | (NA) | 101,376 | (5) | 106,174 | 126,443 | 127,643 | (NA) | (NA) | -12,325 | -33,973 | 5,155 |
| 31 Share-cash..... | 3,670 | 5,995 | 5,556 | 7,008 | (NA) | (NA) | (NA) | 8,427 | 14,623 | | (NA) | (NA) | -2,325 | 439 | -1,452 |
| 32 Crop-share..... | 71,474 | 98,327 | | | | | | | | | | | | | |
| 33 Livestock-share..... | 1,611 | 1,835 | 97,314 | 93,073 | (NA) | (NA) | (NA) | 181,157 | 373,551 | 284,760 | (NA) | (NA) | -224 | 2,848 | 4,241 |
| 34 Croppers..... | 160,246 | 198,057 | 270,296 | 299,118 | 368,408 | 392,897 | 344,342 | 333,713 | | | (NA) | (NA) | -37,811 | -72,239 | -28,822 |
| 35 Other..... | 11,827 | 11,738 | 34,122 | 47,824 | (NA) | (NA) | (NA) | 184,970 | 125,501 | (NA) | (NA) | (NA) | 89 | | |
| 36 Unspecified..... | 8,675 | 14,270 | | | | | | | | | | | -5,595 | -8,114 | -13,702 |

NA Not available. ¹For 1920, standing renters (renters paying a fixed quantity of products) for the North and the West were included with "cash tenants," and those for the South with "other tenants." For 1910, standing renters were included with "cash tenants" for all States; for 1900, standing renters and unspecified tenants were included with tenants; for 1890 and 1880, all tenants were classified as either renting for fixed money rental or for share of products. See Table 1. ²In determining increase or decrease 1910 to 1920, the 27,072 white and the 77,924 nonwhite standing renters reported for the South for 1920 were included with cash tenants, since the 1910 figures for cash tenants include standing renters. See Footnote 1. ³In determining increase or decrease 1900 to 1910, other and unspecified tenants for 1910 were included with cash tenants, since the 1900 figures for cash tenants include unspecified tenants. See Footnote 1. ⁴South only. See text. ⁵Available for the South only.

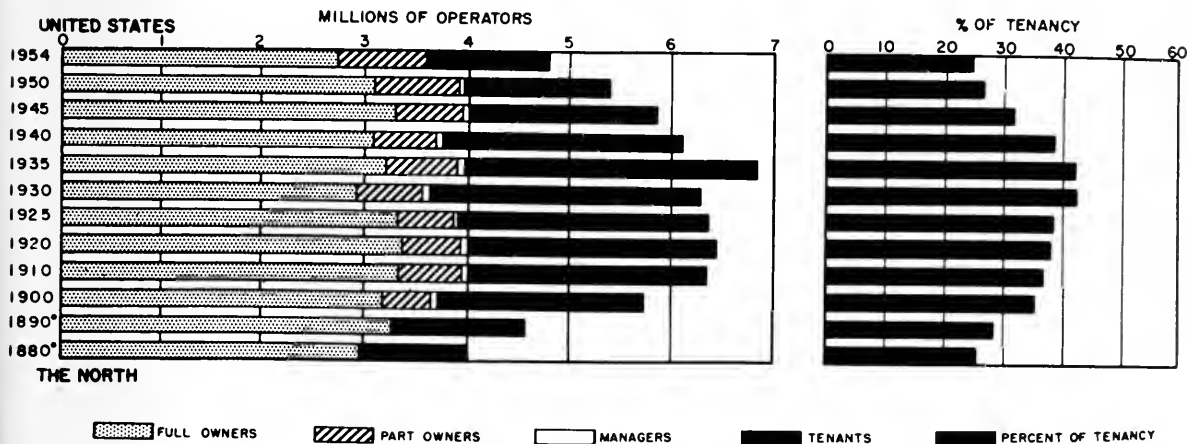
Table 4.—NUMBER OF FARMS, BY COLOR AND TENURE OF

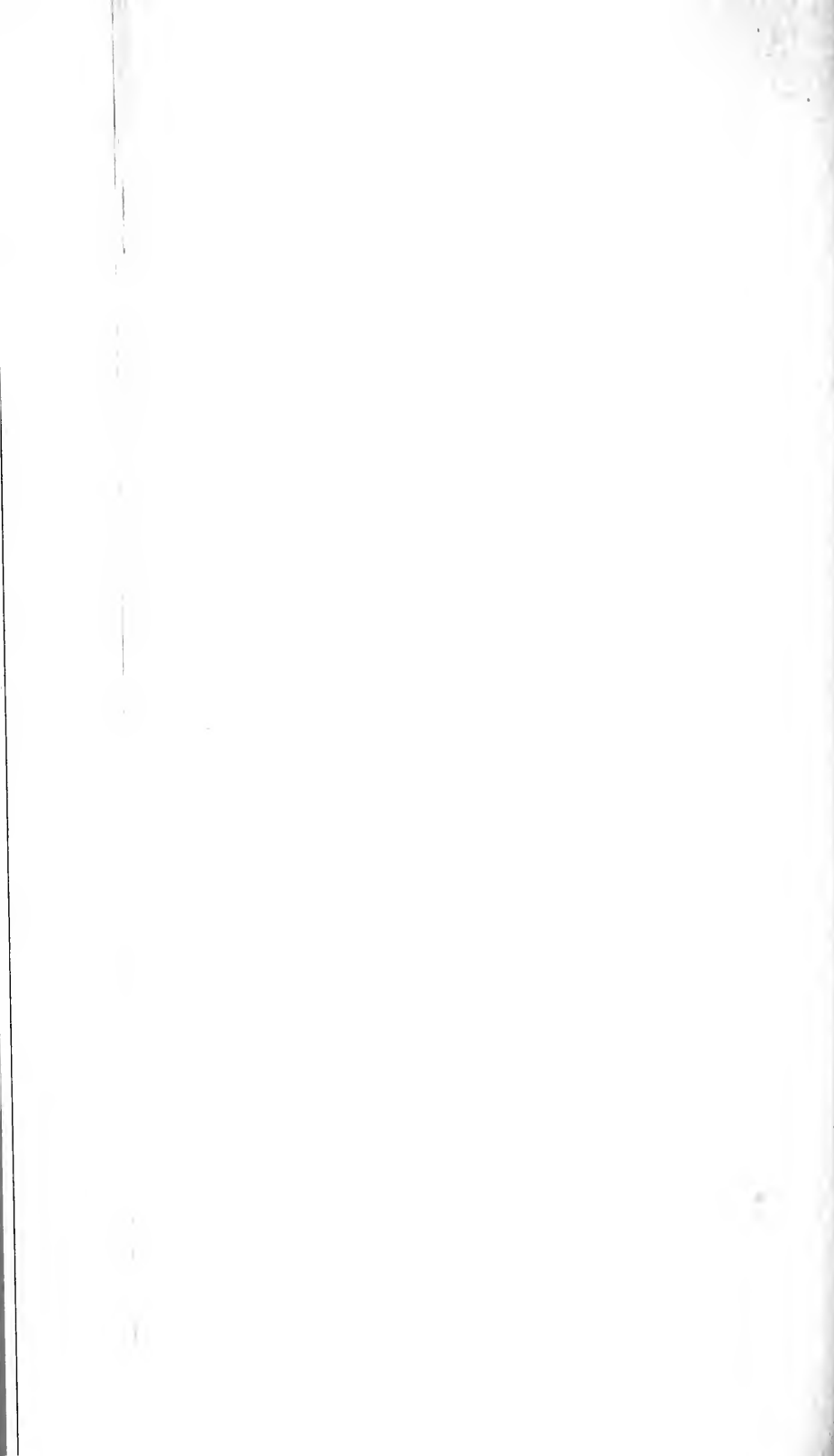
PART III

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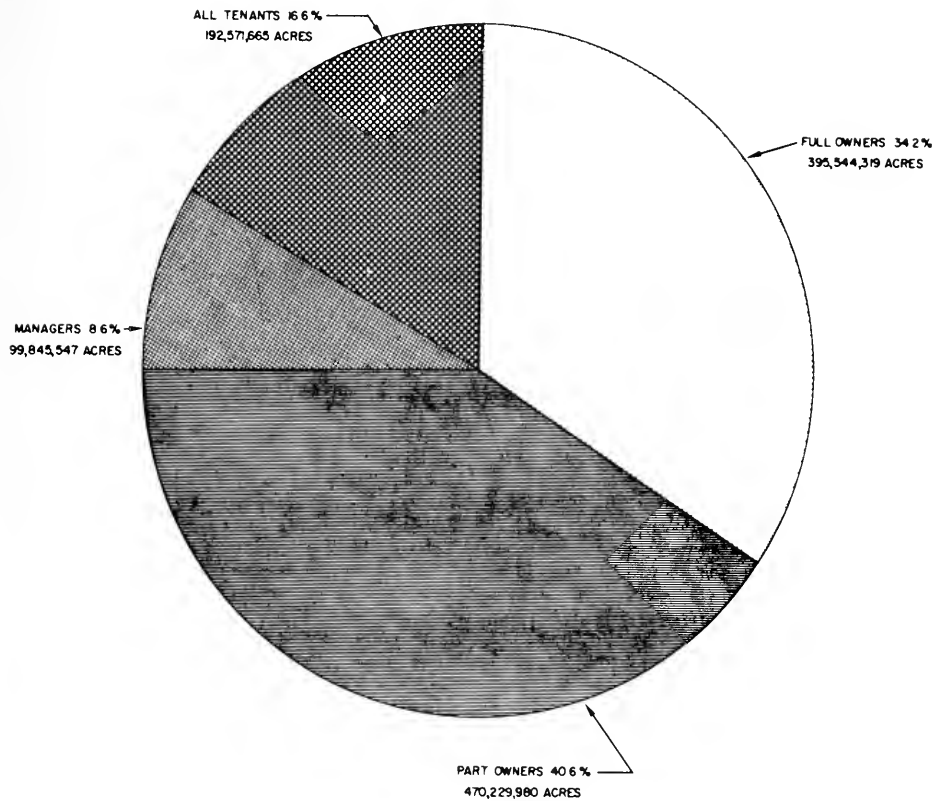
NUMBER OF FARM OPERATORS, BY TENURE, AND PERCENT OF TENANCY, FOR THE UNITED STATES AND REGIONS:
1880 - 1954

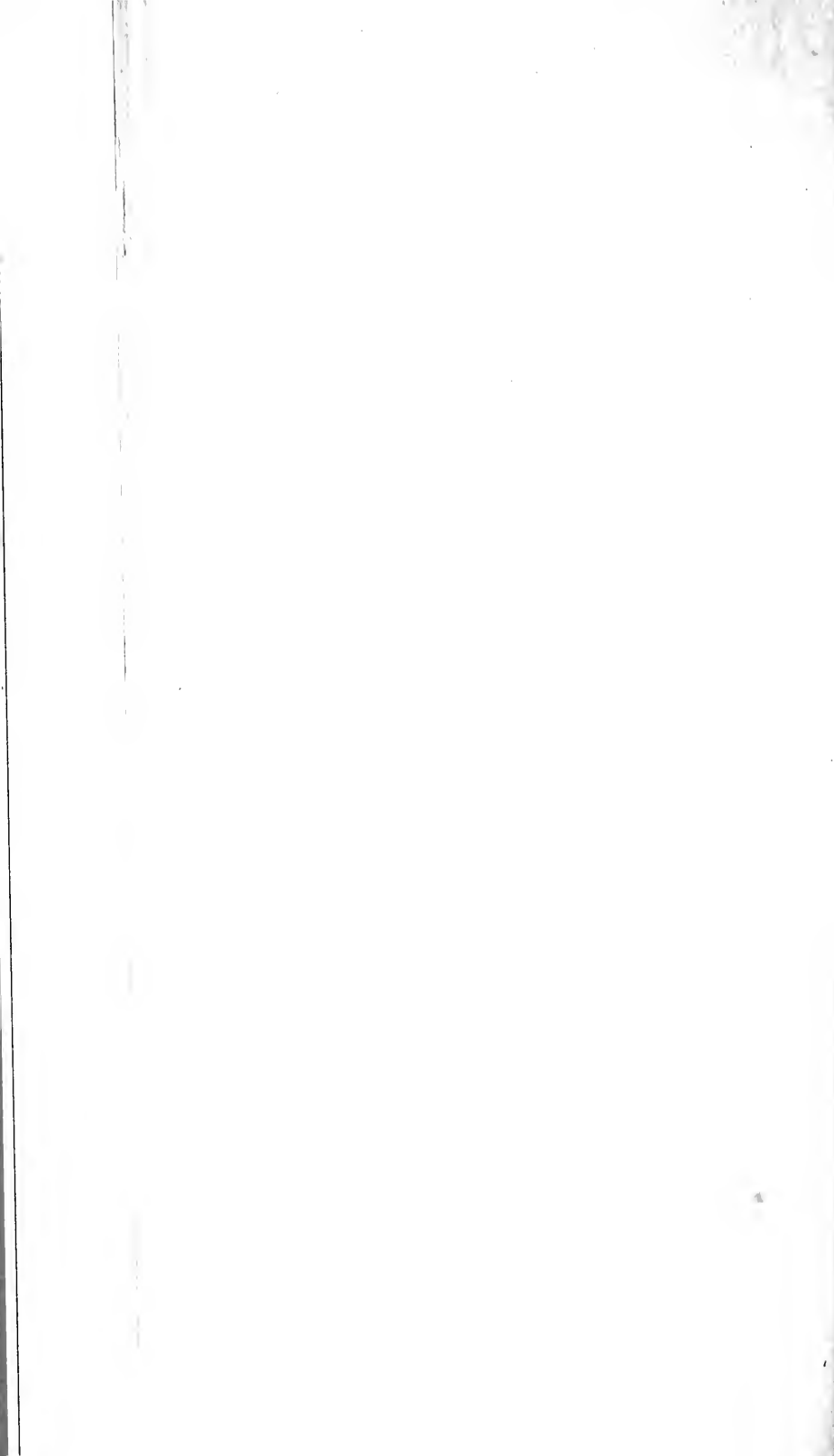




PART IV
Page 1

LAND IN FARMS, BY TENURE OF OPERATOR, FOR THE UNITED STATES 1954





PART IV Page 2 COLOR, RACE, AND TENURE OF FARM OPERATOR

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Table 16.—OWNED AND RENTED LANDS, BY TENURE OF OPERATOR, FOR THE UNITED STATES: 1925 TO 1954

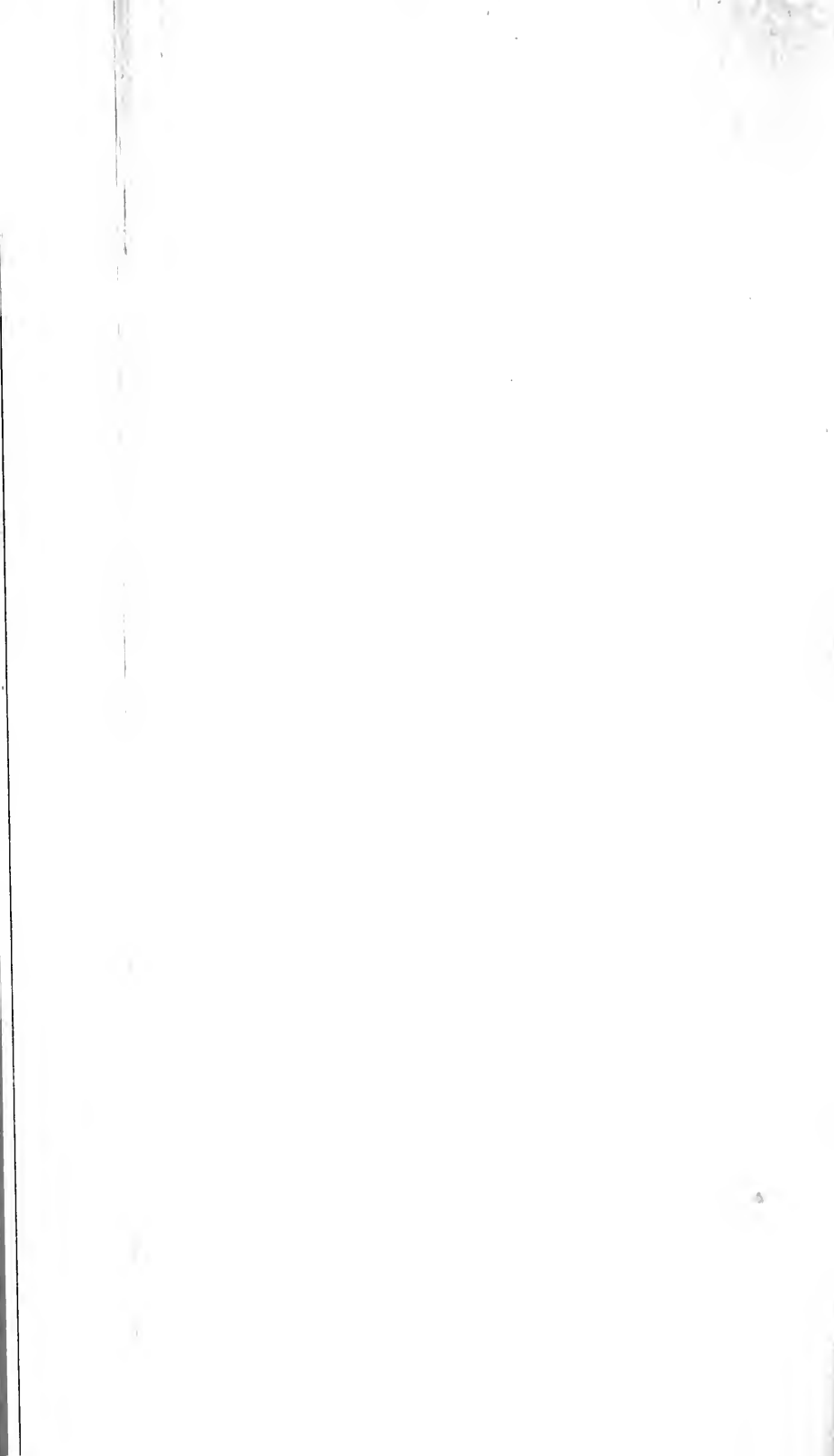
[Data for 1954 are based on reports for only a sample of farms. See text. Figures for divisions and States in Tables 24 to 27.]

| Tenure and year | Number of farms | Land in farms (acres) | Land owned by farm operators | | | Land rented from others by farm operators | | | Land managed for others by farm operators | | | Land rented to others by farm operators | |
|--------------------------------|-----------------|-----------------------|------------------------------|-------------|---------------------------|---|-------------|----------------------------|---|-------------|-----------------------------|---|------------|
| | | | Total | | Operated by owner (acres) | Total | | Operated by renter (acres) | Total | | Operated by manager (acres) | Total | |
| | | | Farms reporting | Acres | | Farms reporting | Acres | | Farms reporting | Acres | | Farms reporting | Acres |
| All farm operators.....1954... | 4,783,021 | 1,160,043,854 | 3,628,328 | 722,721,243 | (NA) | 2,027,963 | 406,085,576 | (NA) | 20,894 | 105,748,246 | 100,002,889 | 634,745 | 74,511,211 |
| 1950.... | 5,382,162 | 1,158,565,852 | 3,914,506 | 717,505,604 | (NA) | 2,269,052 | 410,025,772 | (NA) | 23,527 | 109,880,099 | 105,241,267 | 713,604 | 78,845,623 |
| 1945.... | 5,859,169 | 1,141,615,364 | (NA) | (NA) | 604,617,011 | (NA) | (NA) | 430,675,521 | (NA) | (NA) | 106,371,802 | (NA) | (NA) |
| 1940.... | 6,096,799 | 1,060,856,374 | (NA) | (NA) | 526,737,455 | (NA) | (NA) | 467,584,802 | (NA) | (NA) | 66,530,117 | (NA) | (NA) |
| 1935.... | 6,812,350 | 1,054,515,111 | (NA) | (NA) | 522,680,922 | (NA) | (NA) | 471,169,929 | (NA) | (NA) | 60,664,260 | (NA) | (NA) |
| 1930.... | 6,288,648 | 986,771,016 | (NA) | (NA) | 493,197,690 | (NA) | (NA) | 431,587,424 | (NA) | (NA) | 61,989,902 | (NA) | (NA) |
| 1925.... | 6,371,640 | 924,319,352 | (NA) | (NA) | 519,994,786 | (NA) | (NA) | 361,227,620 | (NA) | (NA) | 43,096,946 | (NA) | (NA) |
| Full owners.....1954.... | 2,744,708 | 397,214,478 | 2,744,708 | 442,792,435 | 397,214,478 | 10,544 | 1,629,957 | xxx | xxx | xxx | xxx | xxx | 47,207,914 |
| 1950.... | 3,089,583 | 418,970,081 | 3,089,583 | 468,335,392 | 418,970,081 | xxx | xxx | xxx | xxx | xxx | xxx | 548,814 | 49,365,311 |
| 1945.... | 3,301,361 | 412,357,893 | 3,301,361 | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx |
| 1940.... | 3,084,118 | 382,048,424 | 3,084,118 | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx |
| 1935.... | 3,210,522 | 390,977,830 | 3,210,522 | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx |
| 1930.... | 2,911,644 | 372,444,683 | 2,911,644 | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx |
| 1925.... | 3,133,490 | 419,445,827 | 3,133,490 | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx |
| Part owners.....1954.... | 868,180 | 472,464,635 | 868,180 | 277,233,743 | (NA) | 868,180 | 212,262,196 | (NA) | xxx | xxx | xxx | 32,350 | 17,091,264 |
| 1950.... | 824,923 | 428,394,476 | 824,923 | 249,170,212 | (NA) | 824,923 | 195,996,046 | (NA) | xxx | xxx | xxx | 121,920 | 22,731,782 |
| 1945.... | 660,502 | 371,251,483 | 660,502 | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx |
| 1940.... | 615,039 | 300,325,307 | 615,039 | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx |
| 1935.... | 686,867 | 266,070,714 | 686,867 | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx |
| 1930.... | 656,150 | 245,765,107 | 656,150 | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx |
| 1925.... | 554,842 | 136,889,692 | 554,842 | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx | xxx |
| Managers.....1954.... | 20,894 | 100,302,885 | (NA) | (NA) | xxx | xxx | xxx | xxx | 20,894 | 105,748,246 | 100,002,889 | 3,399 | 5,745,361 |
| 1950.... | 23,527 | 105,241,267 | (NA) | (NA) | xxx | xxx | xxx | xxx | 23,527 | 109,880,099 | 105,241,267 | 3,889 | 4,638,812 |
| 1945.... | 38,889 | 106,371,802 | (NA) | (NA) | xxx | xxx | xxx | xxx | 38,889 | 106,371,802 | xxx | xxx | xxx |
| 1940.... | 36,351 | 66,530,117 | (NA) | (NA) | xxx | xxx | xxx | xxx | 36,351 | xxx | xxx | xxx | xxx |
| 1935.... | 48,104 | 60,664,260 | (NA) | (NA) | xxx | xxx | xxx | xxx | 48,104 | xxx | xxx | xxx | xxx |
| 1930.... | 55,889 | 61,989,902 | (NA) | (NA) | xxx | xxx | xxx | xxx | 55,889 | xxx | xxx | xxx | xxx |
| 1925.... | 40,700 | 43,096,946 | (NA) | (NA) | xxx | xxx | xxx | xxx | 40,700 | xxx | xxx | xxx | xxx |
| All tenants.....1954.... | 1,149,239 | 190,361,856 | 15,440 | 2,699,065 | xxx | 1,149,239 | 192,193,463 | 190,361,856 | (NA) | xxx | xxx | 42,330 | 4,526,672 |
| 1950.... | 1,444,129 | 211,960,028 | xxx | xxx | xxx | 1,444,129 | 214,069,726 | 211,960,028 | (NA) | xxx | xxx | 38,981 | 2,109,698 |
| 1945.... | 1,858,421 | 251,634,166 | (NA) | (NA) | xxx | 1,858,421 | xxx | 251,634,166 | (NA) | xxx | xxx | xxx | xxx |
| 1940.... | 2,361,271 | 311,898,526 | (NA) | (NA) | xxx | 2,361,271 | xxx | 311,898,526 | (NA) | xxx | xxx | xxx | xxx |
| 1935.... | 2,865,155 | 336,802,307 | (NA) | (NA) | xxx | 2,865,155 | xxx | 336,802,307 | (NA) | xxx | xxx | xxx | xxx |
| 1930.... | 2,664,365 | 306,409,324 | (NA) | (NA) | xxx | 2,664,365 | xxx | 306,409,324 | (NA) | xxx | xxx | xxx | xxx |
| 1925.... | 2,462,608 | 264,886,887 | (NA) | (NA) | xxx | 2,462,608 | xxx | 264,886,887 | (NA) | xxx | xxx | xxx | xxx |
| Cash.....1954.... | 160,131 | 36,959,882 | 2,693 | 659,513 | xxx | 160,131 | 37,658,727 | 36,959,882 | (NA) | xxx | xxx | 9,638 | 1,358,358 |
| 1950.... | 212,790 | 42,203,019 | xxx | xxx | xxx | 212,790 | 42,929,024 | 42,203,019 | (NA) | xxx | xxx | 10,328 | 726,009 |
| Share-cash.....1954.... | 165,241 | 46,210,227 | 3,703 | 623,257 | xxx | 165,241 | 46,409,890 | 46,210,227 | (NA) | xxx | xxx | 6,433 | 822,920 |
| 1950.... | 193,109 | 48,690,162 | xxx | xxx | xxx | 193,109 | 48,951,038 | 48,690,162 | (NA) | xxx | xxx | 4,169 | 260,876 |
| Crop-share.....1954.... | 327,261 | 53,987,449 | 4,815 | 811,191 | xxx | 327,261 | 54,416,040 | 53,987,449 | (NA) | xxx | xxx | 14,061 | 1,239,782 |
| 1950.... | 419,740 | 58,701,093 | xxx | xxx | xxx | 419,740 | 59,212,151 | 58,701,093 | (NA) | xxx | xxx | 12,365 | 511,098 |
| Livestock-share.....1954.... | 111,154 | 29,676,080 | 1,552 | 229,639 | xxx | 111,154 | 29,776,477 | 29,676,080 | (NA) | xxx | xxx | 3,048 | 330,036 |
| 1950.... | 115,277 | 28,097,755 | xxx | xxx | xxx | 115,277 | 28,170,846 | 28,097,755 | (NA) | xxx | xxx | 1,788 | 73,141 |
| Croppers &.....1954.... | 267,662 | 9,412,841 | 804 | 56,091 | xxx | 267,662 | 9,499,353 | 9,412,841 | (NA) | xxx | xxx | 2,460 | 142,603 |
| 1950.... | 346,765 | 14,166,148 | xxx | xxx | xxx | 346,765 | 14,297,191 | 14,166,148 | (NA) | xxx | xxx | 3,435 | 131,043 |
| Other.....1954.... | 52,669 | 5,311,200 | 773 | 124,396 | xxx | 52,669 | 5,441,038 | 5,311,200 | (NA) | xxx | xxx | 2,981 | 294,234 |
| 1950.... | 48,071 | 5,339,127 | xxx | xxx | xxx | 48,071 | 5,500,842 | 5,339,127 | (NA) | xxx | xxx | 2,292 | 107,715 |
| Unspecified.....1954.... | 65,121 | 8,804,177 | 1,100 | 190,978 | xxx | 65,121 | 8,991,938 | 8,804,177 | (NA) | xxx | xxx | 3,709 | 378,718 |
| 1950.... | 106,377 | 14,706,764 | xxx | xxx | xxx | 106,377 | 15,008,584 | 14,706,764 | (NA) | xxx | xxx | 4,604 | 301,820 |

NA Not available.
only. See text.

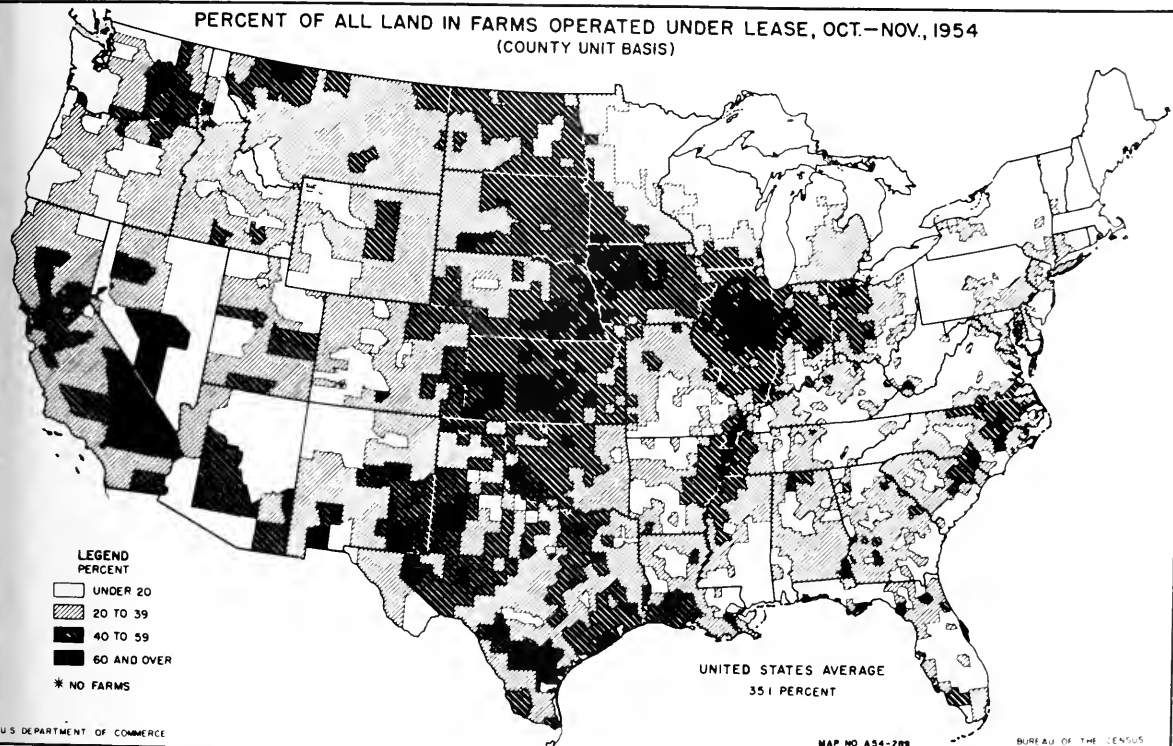
¹87,712,542 acres reported as owned by employers of managers and 18,659,260 reported as rented from others by employers of managers.

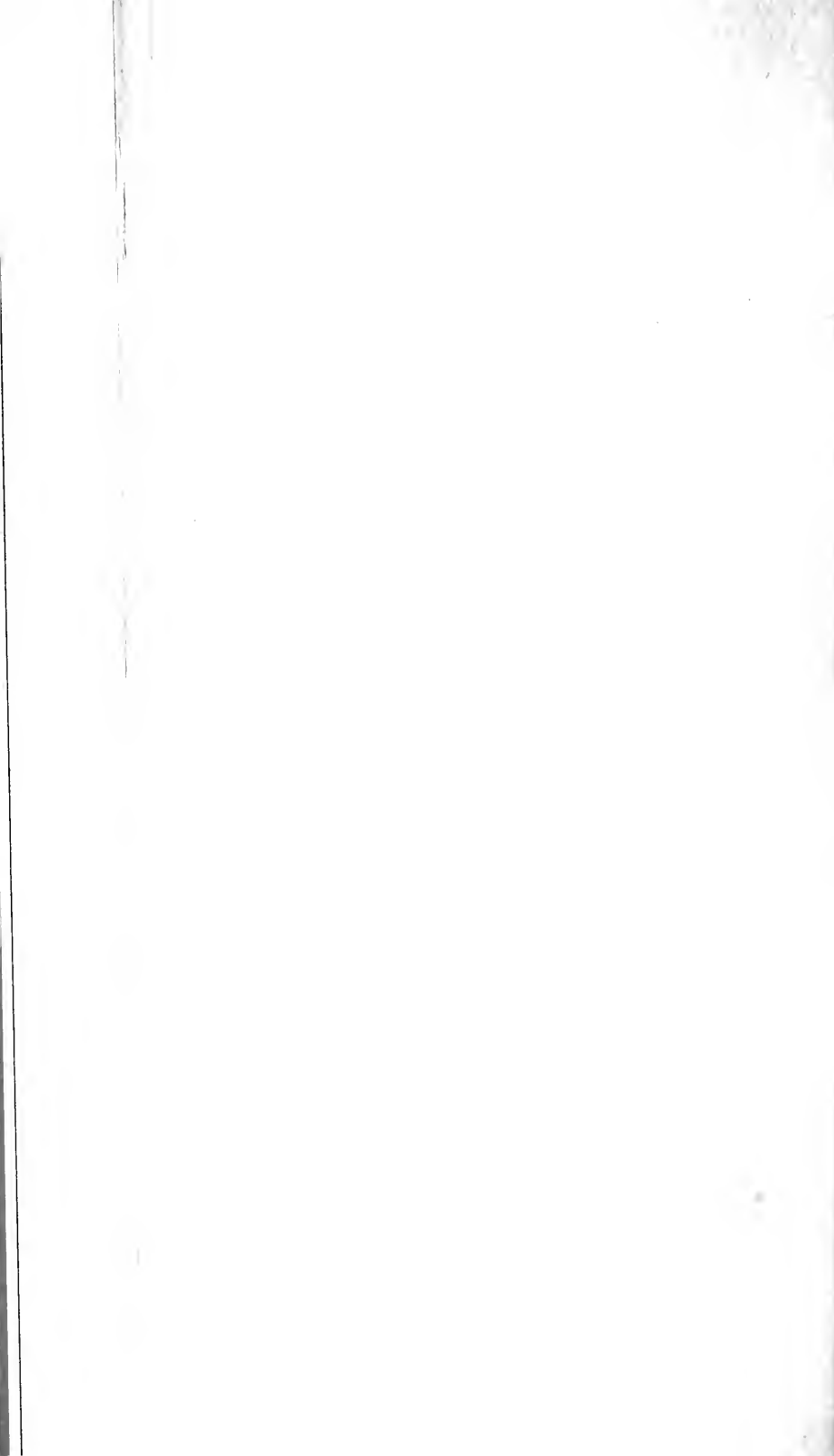
²South



PART V

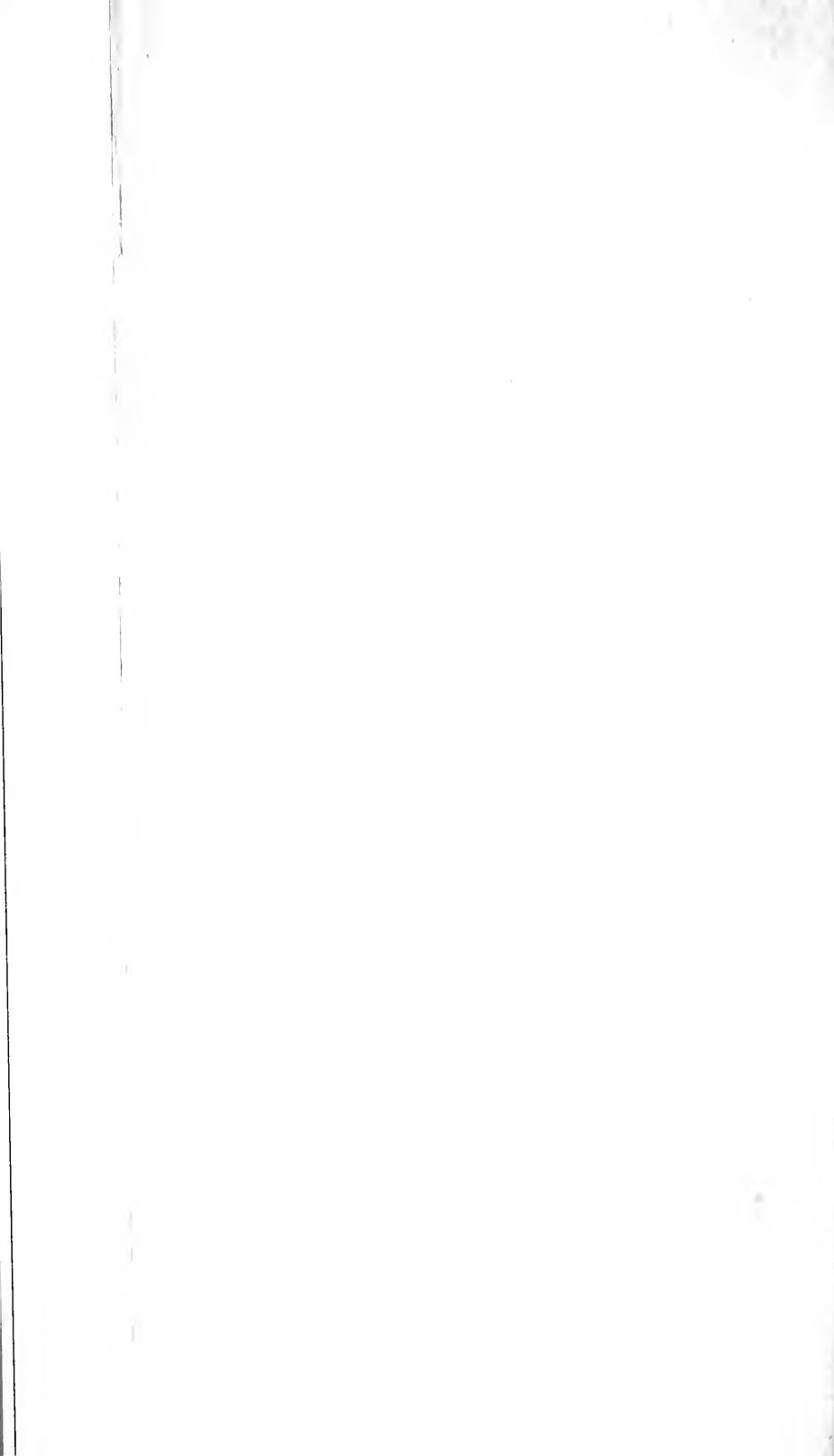
PERCENT OF ALL LAND IN FARMS OPERATED UNDER LEASE, OCT.-NOV., 1954
(COUNTY UNIT BASIS)





PART VI
Page 1

| | | |
|----------------------------------|---|-----------------------|
| | shall be considered as "property used in the trade or business" | |
| <u>harvested</u> | <u>if</u> | <u>sold</u> |
| <u>land</u> | <u>crop and land</u> | <u>are</u> |
| <u>used in trade or business</u> | | <u>exchanged</u> |
| <u>held more than 6 months</u> | | <u>converted</u> |
| | | <u>at same time</u> |
| | | <u>to same person</u> |



shall be considered ^{as} property
in case the crops on land
are used and ^{are} used for more
than six months
in trade or business

if

crops and land are sold
or exchanged
or converted
into money or
other property
or described
in paragraph # 2
time the person
the same



FILED

JAN 30 1959

PAUL P. O'BRIEN, CLERK

No. 15,950

United States Court of Appeals
For the Ninth Circuit

| | |
|------------------------------|-------------------|
| BIDART BROS., a corporation, | } |
| vs. | |
| UNITED STATES OF AMERICA, | |
| | <i>Appellant,</i> |
| | <i>Appellee.</i> |

Appeal from the United States District Court for the
Southern District of California,
Northern Division.

Honorable Gilbert H. Jertberg, Judge.

APPELLANT'S PETITION FOR A REHEARING.

CONRON, HEARD & JAMES,
CALVIN H. CONRON, JR.,

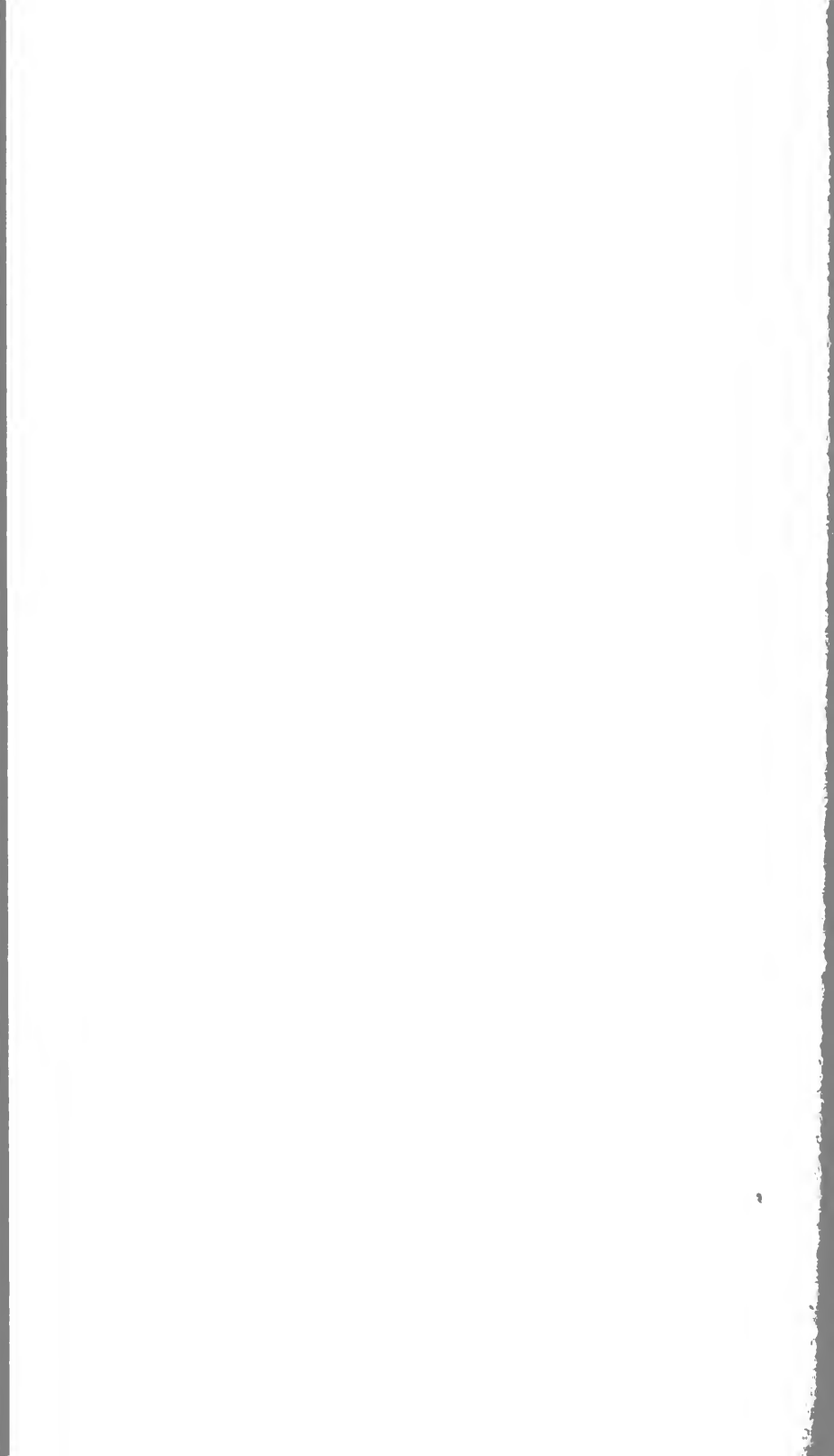
7 Habersfelde Building Arcade,
Bakersfield, California,

*Attorneys for Appellant
and Petitioner.*

RECEIVED

JAN 30 1959

PAUL P. O'BRIEN
CLERK



United States Court of Appeals
For the Ninth Circuit

BIDART BROS., a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the
Southern District of California,
Northern Division.

Honorable Gilbert H. Jertberg, Judge.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable Chief Judge, and to the Honorable
Associate Judges of the United States Court of
Appeals for the Ninth Circuit:*

Comes now appellant, Bidart Bros., a corporation,
and respectfully petitions the above entitled Court
for a rehearing and a reconsideration of its opinion
in the above matter, rendered January 7, 1959.

The reason for this urgent request is that the en-
tire opinion is based upon an erroneous premise, and
the conclusion reached is as erroneous as the premise
upon which it is based, namely, that there is a neces-
sity for a new and further definition of "land".

This term is one of the most commonly understood
and least confusing words in the English language.

Land is the solid substance of the earth as distinguished from the atmosphere and the liquid portion thereof, to-wit, water. To pose the question "Is a 'leasehold' land?" is to create an artificial absurdity. The answer is obviously "No". A leasehold is one method of tenure by which land is commonly held. Neither is a "fee simple" land. It is another method of tenure by which "land" is held.

The plain language of the statute itself excludes the idea of one form of tenure being preferred to another, in the following language:

"In the case of an unharvested crop on land used in the trade or business and held for more than six months . . ."

It is the six months holding time that has been adopted by Congress as a breaking point between short and long term capital gains, and it has applied this breaking point to real property and to personal property alike. The opinion in its present form entirely overlooks this basic premise. The opinion suggests that taxation as capital gains is not a matter of right but of grace. True. But the Legislature has extended the grace in the language it has used.

It is suggested that an affirmative statement by Congress is needed to include unharvested crops grown on land held under lease. The answer to this contention is that Congress has, in the language it has used, done exactly that. As noted in the *Corn Products* case cited in the opinion, the recent extensions to Section 117 of the old Act pertaining to capital gains were basically designed to relieve taxpayers who sell

their business of harsh and extreme tax burdens. This basic premise applies with equal force to unharvested crops growing upon land held under tenure and land held under fee title.

Several questions are posed on page 5 of the opinion:

First, did Congress without question intend to permit the sale of unharvested crops growing on any leasehold? The answer is that Congress intended unharvested crops to be accorded capital gains treatment if the land was held more than six months. Congress did not differentiate between the value of the unharvested crops and the value of the right to hold the land, if it was held more than six months.

The horrible example set forth in footnote 6 is not in point. A farmer who owns his land and then leases it and sells the unharvested crop is not disposing of his entire interest in the land, which is the situation where a lessee farmer goes out of the farming business and disposes of it in its entirety.

There is no danger in an owner-lessee subterfuge. Sight should not be lost of the fact that after the sale of the unharvested crop the purchaser will have further operations in connection with the crop, to bring it to maturity, and when the crop is harvested and sold then a transaction under the category of ordinary income will in all cases eventually come to pass.

It may well be that Congress may choose to give further consideration to the language of Section 117

(j) (3) and to be more specific in defining the transactions to which the section applies. In its present form, however, the clear and unequivocal language of the section includes every form of land holding that has been in existence for more than six months.

Finally, the opinion in its present form is in violation of Article I, Section 8, subdivision (1) of the Constitution of the United States, which requires all taxes, duties, imposts and excises shall be uniform throughout the United States. The result of this opinion is a total lack of uniformity in the treatment of unharvested crops, with the result that 60% of farmers growing unharvested crops are denied capital gains treatment on the crops in the case of sales of their farms and crops, while 30% plus are afforded the special privilege of long term capital gain treatment.

The decisions are legion to the effect that it is unconstitutional to discriminate between persons on the basis of race, creed or color.

It is equally unconstitutional to discriminate between persons on the basis of tenure.

For the foregoing reasons a reconsideration of this problem is respectfully urged.

Dated, Bakersfield, California,
January 28, 1959.

CONRON, HEARD & JAMES,
By CALVIN H. CONRON, JR.,
*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, Bakersfield, California,

January 28, 1959.

CALVIN H. CONRON, JR.,

*Of Counsel for Appellant
and Petitioner.*



In the United States Court of Appeals for the Ninth Circuit

Civil Case No. 15951

In the Matter of a Petition of

**ROBERT ALLEN PRITCHARD for a Writ of Habeas
Corpus,**

ROBERT ALLEN PRITCHARD,
Petitioner-Appellant,

v.

**CLARENCE T. GLADDEN, Warden of the Oregon State
Penitentiary,**

Respondent-Appellee.

**Appeal From an Order Denying a Petition
For a Writ of Habeas Corpus**

Honorable WILLIAM G. EAST, Judge

ROBERT Y. THORNTON
Attorney General of Oregon

PETER S. HERMAN
Assistant Attorney General
Salem, Oregon
Attorneys for Appellee

ROBERT ALLEN PRITCHARD
On his own behalf

FILED

MAY 23 1900

PAUL P. O'BRIEN, CLERK



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JURISDICTION OF UNITED STATES COURT OF APPEALS

This case is an appeal from an order of the United States District Court for the District of Oregon denying appellant's petition for a writ of habeas corpus. The Honorable William G. East granted a certificate of probable cause to permit an appeal from the order of denial. Title 28 U.S.C., § 2253, confers jurisdiction upon this court to review the order of denial.

JURISDICTION OF THE UNITED STATES DISTRICT COURT

The appellee challenges the jurisdiction of the United States District Court to entertain appellant's petition on the ground of appellant's failure to exhaust state remedies.

The following facts are pertinent to the question of the exhaustion of state remedies [see paragraphs IX and X of appellant's petition and exhibits annexed to petition, Tr. 11]:

1. May 7, 1952, appellant convicted under section 23-1034, O.C.L.A. (infra, p. 10) in the Circuit Court of the State of Oregon for Klamath County of the crimes of contributing to the delinquency of three minor children.

2. May 22, 1957, appellant's habeas corpus proceeding in the Marion County Circuit Court challenging aforesaid convictions dismissed.

3. *No appeal taken from this order of dismissal.*

4. Petition for writ of habeas corpus filed in Oregon Supreme Court.

5. June 5, 1957, Oregon Supreme Court denied this petition without opinion.

STATEMENT OF THE CASE

In this appeal from a denial of a petition for a writ of habeas corpus the following federal* questions are raised:

1. Did appellant exhaust his state remedies?

2. Does section 23-1034, O.C.L.A., violate the equal protection clause of the Fourteenth Amendment to the United States Constitution by delegating to the district attorney or grand jury the power to decide whether a case should be prosecuted as for a felony or as for a misdemeanor?

3. Is section 23-1034, O.C.L.A., sufficiently definite to satisfy the due process clause of the Fourteenth Amendment to the United States Constitution?

4. Does section 23-1034, O.C.L.A., violate the equal protection clause of the Fourteenth Amendment to the United States Constitution by reason of the fact that the court has the discretion after conviction to (a) fine or (b) imprison in the county jail or (c) impose both such fine and imprisonment or (d) punish by imprisonment in the Oregon State Penitentiary?

SUMMARY OF ARGUMENT

I

Appellant failed to exhaust his available state remedies and therefore United States District Court did not

have jurisdiction of appellant's petition for a writ of habeas corpus.

Point and Authorities 1

A federal court may not grant a writ of habeas corpus to a state prisoner unless the prisoner has availed himself of one of the corrective processes available in the courts of the state.

United States v. Fay, 248 F. (2d) 520 (2nd Cir., 1957)

Point and Authorities 2

After the dismissal of a writ of habeas corpus by the Marion County Circuit Court, the only corrective process available in Oregon is an appeal from the order dismissing the habeas corpus proceedings.

ORS 34.710

Wix v. Gladden, 204 Or. 597, 284 P. (2d) 356 (1955)

Point and Authorities 3

Since the appellant failed to appeal to the Oregon Supreme Court from the dismissal by the Oregon Circuit Court of appellant's writ of habeas corpus, appellant is precluded from prosecuting habeas corpus in the federal courts.

Daniels (Brown) v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953)

II

Section 23-1034, O.C.L.A., does not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution by granting discretion to the grand jury or district attorney to prosecute as for a felony or a misdemeanor.

Point and Authorities 1

Under Oregon law whether a crime is a felony or a misdemeanor is determined by the punishment authorized to be imposed.

United States Constitution, Fourteenth Amendment

Title 28, U.S.C., § 2241

Oregon Constitution, Article III, section 1

§ 23-101, O.C.L.A.

§ 23-102, O.C.L.A.

§ 23-103, O.C.L.A.

§ 23-1034, O.C.L.A.

Andrews v. Swartz, 156 U.S. 272, 15 S.Ct. 389, 39 L.Ed. 422

State v. Pirkey, 203 Or. 697, 281 P. (2d) 698 (1955)

Point and Authorities 2

Where the punishment authorized may be imprisonment in the penitentiary or jail, or imposition of a fine, the crime is a misdemeanor only if the court, after conviction, imposes a sentence other than incarceration in the penitentiary.

Point and Authorities 3

The only discretion conferred by section 23-1034, O.C.L.A., resides in the court which after conviction may punish as for a misdemeanor or as for a felony.

Oregon Laws 1949, Chapter 129, section 1

§ 23-1034, O.C.L.A.

State v. Pirkey, 203 Or. 697, 281 P. (2d) 698 (1955)

III

Section 23-1034, O.C.L.A., under which appellant was convicted is sufficiently definite to satisfy the due process clause of the Fourteenth Amendment to the United States Constitution.

Point and Authorities

The terms of section 23-1034, O.C.L.A., are sufficiently explicit to have informed the appellant that the conduct which he engaged in was prohibited and subject to penalty.

United States Constitution, Fourteenth Amendment

§ 23-101, O.C.L.A.

§ 23-102, O.C.L.A.

§ 23-103, O.C.L.A.

§ 23-910, O.C.L.A.

§ 23-1034, O.C.L.A.

§ 93-603, O.C.L.A.

Connally v. General Construction Co., 269 U.S. 383, 46 S.Ct. 126, 70 L.Ed. 332

State v. Anthony, 179 Or. 282, 169 P. (2d) 587, cert. den. 330 U.S. 826, 67 S.Ct. 865, 91 L.Ed. 1276

State v. Friedlander, 141 Wn. 1, 250 P. 453 (1927) writ of error dismissed, 275 U.S. 573, 48 S.Ct. 17, 72 L.Ed. 433

IV

Section 23-1034, O.C.L.A., does not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution although the punishment thereunder may be as for a felony or as for a misdemeanor.

Point and Authorities

A statute does not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution simply because the court has the discretion after conviction to punish as for a felony or as for a misdemeanor.

United States Constitution, Fourteenth Amendment

§ 23-103, O.C.L.A.

§ 23-1034, O.C.L.A.

Ex Parte Rosencrantz, 211 Cal. 729, 297 P. 15 (1931)

People v. Queen, 326 Ill. 492, 158 N.E. 148 (1927)

United States v. Meyers, 143 F. Supp. 1 (D. Alaska, 1956)

Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337

ARGUMENT

I

(Point 1)

It is well a settled principle of law that a federal court may not grant a writ of habeas corpus to a state prisoner unless the prisoner has first availed himself of *one* of the corrective processes available in the courts of the state: *United States v. Fay*, 248 F. (2d) 520 (2nd Cir., 1957).

(Point 2)

Under Oregon law where a writ of habeas corpus is dismissed by the circuit court, the proper procedure is to appeal from the order of dismissal: ORS 34.710 (appendix p. 22). In this case appellant did not appeal from the order of the Oregon Circuit Court dismissing his writ of habeas corpus. Instead, appellant chose to file a petition for a writ of habeas corpus in the Oregon Supreme Court, presumably raising the same grounds as raised in the Oregon Circuit Court (subparagraph 2 of paragraph IX, appellant's petition, Tr. 1). Such a procedure is not available under Oregon law: *Wix v. Gladden*, 204 Or. 597, 284 P. (2d) 356 (1955) [Appendix, p. 23].

(Point 3)

By failing to exhaust available state corrective procedures appellant has now lost the right to challenge

his conviction in a federal court: *Daniels (Brown) v. Allen*, 344 U.S. 443, 482, 485-587, 73 S.Ct. 397, 97 L.Ed. 469 (1953), [Appendix, p. 22].

II

(Point 1)

Appellant argues (App. Br. p. 3) that section 23-1034, O.C.L.A., violates Article III, section 1, Oregon Constitution because that statute unlawfully gives a district attorney or grand jury the legislative function of determining whether the crime to be prosecuted is a felony or a misdemeanor. In *form*, perhaps, this contention does not present the federal question of whether appellant is in custody "in violation of the Constitution of the United States": Title 28 U.S.C. § 2241; *Andrews v. Swartz*, 156 U.S. 272, 15 S.Ct. 389, 39 L.Ed. 422.

In *substance*, however, the contention, if correct, raises the question of a denial of equal protection of the laws under the Fourteenth Amendment to the United States Constitution: *State v. Pirkey*, 203 Or. 697, 708, 281 P. (2d) 698 (1955) [Appendix p. 23]. Appellee submits, however, that as applied to section 23-1034, O.C.L.A., the contention is without merit.

In the first place, whether a crime is a felony or misdemeanor is determined, under Oregon law, in general, by the punishment authorized to be imposed: sec-

tions 23-101, 23-102, 23-103, O.C.L.A., (Appendix p. 21, 22). If the punishment authorized to be imposed is death or imprisonment in the penitentiary, the crime is a felony: section 23-101, O.C.L.A., *supra*. If the crime is punished by fine or imprisonment in the county jail, the crime is a misdemeanor: *id*.

(Point 2)

Secondly, where the court is authorized to impose either a penitentiary or jail sentence, fine or both jail and fine, it is the *punishment imposed by the court after conviction* that classifies the crime as either a misdemeanor or a felony: *id*.

(Point 3)

Thirdly, an examination of section 23-1034, O.C.L.A., *supra*, discloses that the only discretion conferred by the legislature in that statute resides in the court.

By way of contrast the legislature did expressly confer upon the magistrate or grand jury in section 1, chapter 129, Oregon Laws 1949 (Appendix p. 20) the discretion to determine whether the defendant should be proceeded against as for a felony or as for a misdemeanor. This statute was held unconstitutional in *State v. Pirkey*, *supra*.

III

Appellant next argues (App. Br. 4) that section 23-1034, O.C.L.A., under which appellant was convicted, is unconstitutional and void under the due process clause of the Fourteenth Amendment because it is too broad and too sweeping.

Section 23-1034, O.C.L.A., provided as follows:

"In all cases where a child shall be a *delinquent child as defined by any statute of this state*, any person responsible for, or by any act encouraging, causing or contributing to the delinquency of such child, or any person who shall by threats, command or persuasion, endeavor to induce any child to do or perform any act or follow any course of conduct which *would cause such child to become a delinquent child*, or any person who shall do any act which *manifestly tends to cause any child to become a delinquent child*, shall be guilty of a crime and, upon trial and conviction thereof, shall be punished by a fine of not more than \$1,000, or by imprisonment in the county jail for a period not exceeding one year, or by both such fine and imprisonment, or by imprisonment in the state penitentiary for a period not exceeding five years." (Emphasis supplied)

It is to be noted that the above statute punishes persons who (1) are responsible for the delinquency of a child or (2) contribute to the delinquency of a child or (3) who induce any child to do an act or follow a course of conduct which would cause such child to become a delinquent child or (4) do any act which manifestly tends to cause the child to become a delinquent child.

The key phrases in the above statute are "delinquent child" and "delinquency of such child." By reference the statute incorporates the definition of those terms as found in other statutes of Oregon. At the time of appellant's conviction child delinquency was defined by section 93-603, O.C.L.A., as follows:

" 'Child delinquency' within the meaning of this act shall be defined as follows: Persons of either sex under the age of eighteen years *who violate any law of the state*, or any city or village ordinance, or persistently refuse to obey family discipline; or are persistently truant from school; or associate with criminals or reputed criminals; or are growing up in idleness and crime; or are found in any disorderly house, bawdy house, or house of ill fame; *or are guilty of immoral conduct*; or visit, patronize, or are found in any gaming house or in any place where any gaming device is or shall be operated, *are hereby classed as delinquent children* and shall be subject to the legal relations and provisions of the juvenile court law and other laws for the care and control of delinquents * * *." (Emphasis supplied)

Delinquent children are defined by the above statute to include persons "who violate any law of the state."

The informations (Appendix p. 18-20) against appellant charge him with soliciting three minor children to engage in "unnatural sexual relations" with him. If the children had in fact engaged in such relations they would have been guilty of sodomy: section 23-910, O.C.L.A., (Appendix p. 22); *State v. Anthony*, 179 Or. 282, 307,

169 P. (2d) 587 (1946) *cert. den.* 330 U.S. 826, 67 S.C. 865, 91 L.Ed. 1276.

It is submitted that the definition of "delinquent child" incorporated into section 23-1034, O.C.L.A., *supra*, was sufficiently explicit to have informed the appellant that the conduct which he engaged in was prohibited and subject to penalty: *Connally v. General Construction Co.*, 269 U.S. 383, 46 S.Ct. 126, 70 L.Ed. 332; *State v. Friedlander*, 141 Wn. 1, 250 P. 453 (1927), *writ of error dismissed* 275 U.S. 573, 48 S.Ct. 17, 72 L.Ed. 433.

Although appellant argues (App. Br. p. 4) that section 23-1034, O.C.L.A., is vague because it uses the phrase "shall be guilty of a crime," it is submitted that this argument is without merit in view of the explicit definitions of "crime" under Oregon law: sections 23-101, 23-102, 23-103, O.C.L.A. (Appendix p. 21, 22).

IV

Under section 23-1034, O.C.L.A., *supra*, the sentencing court after conviction has the discretion to (1) fine up to \$1000 or (2) punish by imprisonment in the county jail for a period not exceeding one year or (3) both such fine and imprisonment or (4) punish by imprisonment in the State penitentiary for a period not exceeding five years. As to any punishment not resulting in a penitentiary sentence, the crime under section 23-1034, O.C.L.A., *supra*, is only a misdemeanor: section 23-103,

O.C.L.A., *supra*, (Appendix p. 22). A penitentiary sentence, of course, means the conviction constituted a felony: *id.*

Appellant argues (App. Br. p. 5) that the discretion in the sentencing court to classify the conviction as a felony or misdemeanor by the punishment imposed violates the equal protection provision of the Fourteenth Amendment to the United States Constitution.

The Supreme Court of the United States has pointed out, however, that

“* * * The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. * * *” *Williams v. New York*, 337 U.S. 241, 247, 69 S.Ct. 1079, 93 L.Ed. 1337.

Although that case involved the question whether the due process clause of the Fourteenth Amendment to the United States Constitution was violated by a New York statute giving the trial judge the right to use extra-judicial information in passing sentence, the case clearly recognizes the propriety of a court's having discretion within the limits fixed by the legislature to determine the extent and kind of punishment to be imposed. The case is all the more striking because the New York Statute (set forth in footnote 2 at page 242 of 337 U.S. Reports) *gave the court the discretion to sentence to death even though the jury had recommended life.*

More directly in point are the cases of *People v. Queen*, 326 Ill. 492, 158 N.E. 148 (1927) and *Ex parte Rosencrantz*, 211 Cal. 729, 297 P. 15 (1931).

In the *Queen* case, *supra*, the court was confronted with the contention that an Illinois statute violated the equal protection clause of the Fourteenth Amendment to the United States Constitution because under that statute the court had the discreion to sentence male offenders between the ages of 16 to 26 to the penitentiary or reformatory. With reference to this contention the Illinois Supreme Court had this to say:

"A sentence to the penitentiary renders the convict infamous while a sentence to the reformatory carries with it no such result. It is therefore a severer grade or degree of punishment than a sentence to the reformatory, and involves consequences to the convict of a much more serious character, as was held in *People v. Mallary*, 195 Ill. 582, 63 N.E. 508, 188 Am. St. Rep. 212. The statute, however, confers jurisdiction on the court to render the judgment of imprisonment in the penitentiary, and it is not a denial of the equal protection of the laws that the court imposed the higher degree of punishment. The power to impose a less severe penalty would not render the imposition of a severer penalty an arbitrary act. Many, if not most, of the sections of the Criminal Code declaring the punishment to be inflicted for violation of their provisions do not impose arbitrary punishments which are of a fixed and unchangeable character, but permit a discretion, which the court may exercise with reference to the circumstances attending the crime and the criminal. This practice has prevailed in this state from the beginning

of its existence and is in accordance with the practice which prevailed in England, where, it is said in Blackstone's Commentaries, the statute law has not often ascertained the quantity of fines nor the common law ever, it directing such an offense to be punished by fine in general without specifying the certain sum. The general nature of the punishment, whether by fine or imprisonment, was in these cases fixed, though the duration and quantity of each must frequently vary, from the aggravations, or otherwise, of the offense, the quality and condition of the parties, and from innumerable other circumstances. 4 Blackstone's Com. 378."

Ex parte Rosencrantz, supra, was a similar case. The contention there made and the holding of the court thereon is fully contained in the following:

"The contention is made that section 476a of the penal Code is unconstitutional, in that by reason of the discretion which it gives to the trial judge to sentence the convicted offender either to the state prison or the county jail, it is discriminatory in operation, and constitutes a denial of equal protection of the laws. The legislative practice of vesting in trial courts or juries discretion in fixing punishments, within certain limits, is quite general and not new. Since every person charged with the offense has the same chance for leniency as well as the same possibility of receiving the maximum sentence, there is nothing discriminatory in the statute."

See also the case of *United States v. Meyers*, 143 F. Supp. 1 (D. Alaska, 1956), where the court upheld an Alaskan criminal statute similar to the statute here in question and which gave the court broad discretion as to punishment.

In conclusion on this point it will suffice to note that it is far more humane for courts to have sufficient discretion in the imposition of punishment so that the punishment imposed—be it probation, fine, jail or penitentiary imprisonment—may fit the offender. Of course, that discretion must be delineated, but it is submitted that § 23-1034, O.C.L.A., fulfills that requirement.

CONCLUSION

For the reasons advanced the appellee submits that the judgment of the court below should be affirmed.

Respectfully submitted,

ROBERT Y. THORNTON
Attorney General of Oregon

PETER S. HERMAN
Assistant Attorney General
Attorneys for Appellee

APPENDIX

*

Appellant also argues (App. Br. p. 6) that his imprisonment is "without authority of law and in violation of due process of law" on the ground that "there was a single continuing act inspired by the same intent, and that he could be guilty of but one offense." The question here presented is simply whether under section 23-1034, O.C.L.A., contributing to the delinquency of three children (see informations, Appendix p. 18-20) is one or three crimes. It is submitted that this issue does not present a question of whether appellant is in custody "in violation of the Constitution of the United States": Title 28 U.S.C. § 2241; *Andrews v. Swartz*, 156 U.S. 272, 15 S.Ct. 389, 39 L.Ed. 422.

The argument ignores the fact that section 23-1034, O.C.L.A., proscribes conduct injuriously affecting *an individual child*: *United States v. Meyers*, 139 F. Supp. 724, 726 (D. Alaska, 1956). In that case the defendant was convicted by jury verdict upon nine counts charging contributing to the delinquency of a minor and was sentenced on each count. The first six counts charged the same offense of molesting a ten-year-old girl at various times and places. The last three counts charged the same offense at various times and places upon three other minor girls.

The defendant contended that the sentence under count 9 was void and illegal for the reason that the sentence under count 2 covered the same time, place and circumstances of the offense charged and hence constituted but one crime.

With reference to this contention the court said:

"In support of his first contention defendant relies upon the case of *Bell v. United States*, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905, holding that a conviction under two counts for violation of the Mann Act, 18

U.S.C.A. § 2421, each referring to a different woman transported on the same trip in the same vehicle, was not valid in the absence of specific provision by Congress making each act a separate offense, upon the principle that defendant committed only a single offense and could not be subjected to cumulative punishment under the two counts. To the same effect see *Youst v. United States*, 5 Cir., 151 F.2d 666, where the defendant was sentenced twice for the same conspiracy to violate such Act. These cases are clearly distinguishable from the crime of contributing to the delinquency of a child as defined by Sec. 65-9-11, A.C.L.A. 1949. The essence of the crime charged in the Bell case was transportation, and in the Youst case conspiracy, constituting one and the same act, *whereas the statute here involved contemplates the protection of the individual child.*

"Count 2 charged the commission of such offense upon one child and Count 9 upon another child, although at the same time and place. These counts charged separate and distinct offenses. It is fundamental that the court may impose separate and cumulative sentences under the same statute for distinct offenses. 15 Am. Jur., Criminal Law, Sec. 451; United States v. Peeke, 3 Cir., 153 F. 166, 12 L.R.A., N.S., 314; Ex parte Rudy, 7 Alaska 446. The true test is whether or not each offense requires proof of some fact which the others do not. United States v. Noveck, 273 U.S. 202, 206, 47 S.Ct. 341, 71 L.Ed. 610; Dimenza v. Johnston, 9 Cir., 130 F.2d 465. Such was true in this instance." (Emphasis supplied)

Information of District Attorney—2246-C (1)

(Annexed to Appellant's petition, Tr. 1)

"Robert Allen Pritchard having been accused and brought into Court and charged with the crime of Contributing To The Delinquency of A Minor and having

appeared before David R. Vandenburg, Judge of the above entitled Circuit Court, and waived Indictment therefore, the undersigned District Attorney of this District hereby files this Information against said Robert Allen Pritchard and charges him with the crime of Contributing To The Delinquency Of A Minor, committed as follows:

"The said Robert Allen Pritchard on the 26th day of April A. D. 1952, in the said County of Klamath and State of Oregon, then and there being, did then and there wilfully, unlawfully and feloniously encourage, solicit and endeavor to persuade Barbara Stinson, a female child of the age of 15 years, to do an act which would cause the said Barbara Stinson to become a delinquent child, to-wit: Did encourage, solicit and endeavor to persuade the Barbara Stinson to participate in unnatural sexual relationships with him, the said Robert Allen Pritchard, which said acts manifestly tend to cause the said Barbara Stinson to become a delinquent child:

"Contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon. (23-1034)"

Information of District Attorney—2246-C (2)

(Annexed to Appellant's petition, Tr. 1)

*

*

*

"That said Robert Allen Pritchard on the 26th day of April A.D. 1952, in the said County of Klamath and State of Oregon, then and there being, did then and there wilfully, unlawfully and feloniously encourage, solicit and endeavor to persuade Darlene Smart, a female child of the age of 12 years, to do an act which would cause the said Darlene Smart to become a delinquent child, to-wit: Did encourage, solicit and endeavor to persuade the said Darlene Smart to participate in unnatural sexual relationships with him, the said Robert Allen Pritchard, and at the same time and place did display

and exhibit to the said Darlene Smart various lewd and immoral photographs of men and women: which said acts manifestly tend to cause the said Darlene Smart to become a delinquent child:

* * *

Information of District Attorney—2247-C (3)

(Annexed to Appellant's petition, Tr. 1)

* * *

"That said Robert Allen Pritchard on the 26th day of April A.D. 1952, in the said County of Klamath and State of Oregon, then and there being, did then and there wilfully, unlawfully and feloniously encourage, solicit and endeavor to persuade Emily Darlene Johnson, a female child of the age of 13 years, to do an act which would cause the said Emily Darlene Johnson to become a delinquent child, to-wit; Did encourage, solicit and endeavor to persuade the said Emily Darlene Johnson to participate in unnatural sexual relationships with him, the said Robert Allen Pritchard, and at the same time and place did display and exhibit to the said Emily Darlene Johnson various lewd and immoral photographs of men and women; which said acts did manifestly tend to cause the said Emily Darlene Johnson to become a delinquent child."

* * *

Oregon Laws 1949, Chapter 129, section 1, (Declared unconstitutional in *State v. Pirkey*, infra p. 23)

"Any person who, for himself or as the agent or representative of another, or as an officer, agent or employe of a corporation, and on behalf thereof, shall wilfully, with intent to defraud, make or draw, or utter or deliver any check, draft or order upon any bank or other depository, for the payment of money, knowing at the time of such making, drawing, uttering or delivering that the marker or drawer, or his principal, or the corporation,

has not sufficient funds in, or credit with said bank or other depository for the payment of such check, draft or order, in full upon its presentation, although no express representation is made that there are sufficient funds in or credit with such bank or other depository for its payment in full upon presentation, shall be guilty of a crime and *may be proceeded against either as for a misdemeanor or as for a felony, in the discretion of the grand jury or the magistrate to whom complaint is made, or before whom the action is tried, as the case may be;* and upon conviction thereof, if proceeded against as for or convicted of a misdemeanor, shall be punished by imprisonment in the county jail for not more than one year, or by a fine of not to exceed one thousand dollars (\$1,000), or by both such fine and imprisonment, or, if proceeded against as for and convicted of a felony, shall be punished by imprisonment in the penitentiary for not more than five years. If a person be proceeded against hereunder as for a misdemeanor, justice's courts, district courts and circuit courts shall have concurrent jurisdiction of such crime." (Emphasis supplied)

23-101, O.C.L.A.

"A crime or public offense is an act or omission forbidden by law, and punishable upon conviction by either of the following punishments:

- "(1) Death;
- "(2) Imprisonment;
- "(3) Fine;
- "(4) Removal from office;
- "(5) Disqualification to hold and enjoy any office of honor, trust, or profit under the constitution or laws of this state."

23-102, O.C.L.A.

"Crimes are divided into:

- "(1) Felonies; and
- "(2) Misdemeanors."

§ 23-103, O.C.L.A.

"A felony is a crime which is punishable with death, or by imprisonment in the penitentiary of this state. When a crime punishable by imprisonment in the penitentiary is also punishable by a fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the penitentiary."

§ 23-910, O.C.L.A.

"If any person shall commit sodomy or the crime against nature, or any act or practice of sexual perversity, either with mankind or beast, or sustain osculatory relations with the private parts of any man, woman or child, or permit such relations to be sustained with his or her private parts, such person shall upon conviction thereof, be punished by imprisonment in the penitentiary not less than one year nor more than fifteen years."

ORS 34.710

"Any party to a proceeding by habeas corpus, including the state when the district attorney appears therein, may appeal from the judgment of the court refusing to allow such writ or any final judgment therein, either in term time or vacation, in like manner and with like effect as in an action. No question once finally determined upon a proceeding by habeas corpus shall be re-examined upon another proceeding of the same kind."

Daniels (Brown) v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953)

"* * * clearly the state's procedure for relief must be employed in order to avoid the use of federal habeas corpus as a matter of procedural routine to review state criminal rulings. A failure to use a state's available remedy, in the absence of some interference or incapacity, * * * bars federal habeas corpus. The statute requires

that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ. The judgment must be affirmed." (344 U.S. 487)

State v. Pirkey, 203 Or. 697, 281 P. (2d) 698 (1955)

"* * * It is one thing to fix the term of imprisonment by a grand jury before trial, and quite another to vest discretion in either a court or prison board to fix punishment in its discretion after conviction and upon consideration of the character of the defendant and the circumstances established at the trial. No standards were provided by the statute within which the grand jury or magistrate might exercise discretion, and the facts on which a quasi judicial discretion might be exercised were not available to either grand jury or magistrate.

"We hold that the provision of the statute which purports to vest in a grand jury or magistrate the unguided and untrammelled discretion to determine whether a defendant shall be charged with a felony or a misdemeanor, is unconstitutional. * * *" (203 Or. 707-708)

Wix v. Gladden, 204 Or. 597, 284 P. (2d) 356 (1955)

"In Article VII, Section 2 of the Constitution of Oregon, it is provided that 'the supreme court may, in its own discretion, take original jurisdiction in * * * habeas corpus proceedings.' The question presented by the petition is therefore whether this court in its own sound discretion should take jurisdiction of this case. The statute provides that the petition shall state in substance, among other things, 'That the legality of the imprisonment or restraint has not already been adjudged upon a prior writ of habeas corpus, to the knowledge or belief of the petitioner.' ORS 34.360 (6).

"The petition in the pending case not only fails to comply with the requirements of the statute quoted above, but it affirmatively sets forth that the petition filed in this court is 'an identical petition of the one which

plaintiff filed in the Circuit Court of Marion County on September 4, 1954, same being dismissed on January 26, 1955, without an opinion * * *.' Thus it affirmatively appears that the legality of the imprisonment has already been adjudged upon a prior writ of habeas corpus.

"The order dismissing the petition in the circuit court of Marion County was appealable, but no appeal has been taken. This court declines the invitation to assume jurisdiction in the pending case." (204 Or. 599)

No. 15952 ✓

**United States
Court of Appeals**
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
MOSS AMBER MFG. CO.,
Respondent.

Transcript of Record

**Petition for Enforcement of an Order of the
National Labor Relations Board**

FILED

OCT - 1 1958

No. 15952

United States
Court of Appeals
for the Ninth Circuit

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vs.
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Respondent.

Transcript of Record

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National Labor Relations Board



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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For the Respondent.



GENERAL COUNSEL'S EXHIBIT No. 5-A

Form approved.

Budget Bureau No. 64-R002.8.

United States of America
National Labor Relations Board

PETITION

(Copy)

When this Petition is filed by a labor organization or by an individual or group acting in its behalf, the Petition will not be processed unless the labor organization and any national or international of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

Case No.: 21-RC-4553.

Dated Filed: 9/5/56.

Compliance Status Checked by: /s/ EF.

Instructions—Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

If more space is required for any one item, attach additional sheets, numbering item accordingly.

Attachments Required—Except when this Petition is filed by an employer under section 9 (c) (1) (B) of the act, there must be submitted with the

Petition proof of interest in the form of dated authorization or membership application cards, or other documentary evidence signed by employees, together with an alphabetical list of their names.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority:

1. Purpose of This Petition:
 - A. RC—Certification of Representatives (Individual, Group, Labor Organization)—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner, and Petitioner desires to be certified as representative of the employees for purposes of collective bargaining, pursuant to section 9 (a) and (c) of the act.
2. Name of Employer:

Moss-Amber.

Employer Representative to Contact: Mr. Moss.
3. Address of Establishment Involved:

1st Street, San Fernando.
- 4a. Type of Establishment:

Factory.
- 4b. Identify Principal Product or Service:

Men's Sportswear.
5. Description of Unit Involved:

Included: All cutters.

Excluded: All other production employees, shipping and office employees, maintenance employees, and supervisory employees as defined in the Act.

3a. Number of Employees in Unit:

4.

3b. Is This Petition Supported by 30% or More of the Employees in the Unit?

Yes.

(If you have checked box 1 A (RC) above, check and complete Either item 7a or 7b, whichever is applicable.)

7a. Request for recognition as Bargaining Representative was made on (Month, day, year) and Employer declined recognition on or about (Month, day year). (If no reply received, so state.)

3. Recognized or Certified Bargaining Agent:

None.

I declare that I have read the above petition and that the statements herein are true to the best of my knowledge and belief.

LOS ANGELES JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO,

/s/ GRISELDA KUHLMAN,
Organizer;

By (Miss) GRISELDA KUHLMAN,
(Signature of Representative or Person Filing
Petition.)

2501 S. Hill St.,
Los Angeles, Calif.

Wilfully False Statement on This Petition Can
Be Punished by Fine and Imprisonment (U. S.
Code, Title 18, Section 1001).

[Received in evidence April 29, 1957, as Gen-
eral Counsel's Exhibit No. 5-A.]

GENERAL COUNSEL'S EXHIBIT No. 5-D

United States of America
Before the National Labor Relations Board
Case No. 21-RC-4553

MOSS-AMBER CORPORATION,

Employer,

and

LOS ANGELES JOINT BOARD, AMALGA-
MATED CLOTHING WORKERS OF AMER-
ICA, AFL-CIO,

Petitioner.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9 (c)
of the National Labor Relations Act, a hearing was
held before Irving Helbling, hearing officer.¹ The

¹The Employer's name appears herein as amended
at the hearing.

hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.²

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act.

4. The Petitioner seeks a unit consisting of spreaders and cutters at the Employer's plant at San Fernando, California, excluding all other production employees, shipping and office employees, maintenance employees, and supervisors as defined in the Act. The Employer asserts that the requested unit is inappropriate and contends that the appropriate unit should include, in addition to the em-

²The hearing officer properly rejected an offer of proof made by the Employer with respect to the voting eligibility of a cutter and spreader. An unfair labor practice charge alleging discharge because of union activities respecting this person has been filed with the Board, and it is the Board's customary practice to exclude from representation hearings all evidence relating to unfair labor practices. *Dichello, Incorporated*, 107 NLRB 1642, footnote 2, cf. *Desilu Productions, Inc.*, 106 NLRB 179; *Columbia Pictures Corporation, et al.*, 94 NLRB 466.

employees sought by the Petitioner, employees engaged in designing, spreading, cutting, and pattern-making at the Employer's other plant at Los Angeles, California. The parties further disagree as to the unit placement of certain categories at the San Fernando plant, which are discussed below.

The Employer, under the over-all direction of its president and its vice-president, is engaged in the manufacture and sale of sport shirts. Its San Fernando and Los Angeles plants are about 25 miles apart. At the former plant, which consists of a single large room and a partitioned-off space used as an office, the Employer is engaged primarily in production activities. The Employer's vice-president makes his headquarters at this plant, and supervises its approximately 100 employees. The employees include 1 full-time cutter,³ 2 spreaders, approximately 75 sewing machine operators and a forelady, 5 or 6 pressers, about 5 trimmers, 2 or 3 inspectors, 5 bundle girls, a machinist, and 1 or 2 janitors. At its Los Angeles plant, the Employer (1) maintains its principal office and its showroom; (2) designs, alters and repairs its products, and manufactures certain items, mostly samples; and (3) sells, folds, presses,⁴ boxes, and ships its products, including those made

³This cutter, who lives near Los Angeles, in addition to his full-time cutting, drives the Employer's truck and makes deliveries between the plants on his way to and from work.

⁴This is "finish-pressing," in contrast to the "under-pressing" done at the San Fernando plant.

in San Fernando. The Employer keeps its books and its payroll records at its Los Angeles office, and its president has his headquarters at this plant. The approximately 25 employees include 5 office clericals, 6 or 7 folders, 3 pressers, 3 or 4 boxers, 3 or 4 shippers, a sewer, and 2 employees engaged in designing, spreading, cutting, and pattern-making. The Employer's vice-president supervises the 2 latter employees, in addition to the 100 employees at the San Fernando plant. All the above employees perform the usual duties of their classifications. So far as the record discloses, there is no employee interchange between the 2 plants and there is no history of collective bargaining at either.

Upon the entire record herein, and particularly in view of the geographical separation of the 2 plants, their different functions, the lack of employee interchange and bargaining history, and the fact that no labor organization currently seeks to represent employees at both plants, we find that a unit of employees limited to the San Fernando plant is appropriate.

It is clear from the record that the cutter and spreaders at the San Fernando plant are skilled employees, and that their jobs are, to some extent, complementary.⁵ The Board has found that spreaders and cutters in the garment industry, such as those involved herein, constitute a homogeneous group of skilled employees, with interests separate

⁵Until about September, each of these employees did both spreading and cutting.

and apart from other employees.⁶ We therefore find that the spreader and cutters at the San Fernando plant constitute an appropriate bargaining unit.

There remains for consideration the unit placement of the disputed categories at the San Fernando plant.

Bundle Girls:

The Employer would include, and the Petitioner would exclude, the bundle girls. The Board has found that, although bundle girls handle work done by spreaders and cutters, they clearly do not have the skills required of such employees, and that they do not have a community of interests with spreaders and cutters which would require their inclusion in a unit of these employees.⁷ We therefore exclude bundle girls from the unit.

The Patternmaker-Cutter:

The Employer would include the patternmaker-cutter. The Petitioner would exclude him as a supervisor. He spends about 75 per cent of his time in making patterns and markers. He also does spreading and cutting. He has hired at least one employee and appears to give orders and directions to other spreaders and cutters. In these circumstances, we find that the patternmaker-cutter is a

⁶Little Champ Manufacturers, Inc., 104 NLRB 985 at 990; Rothschild-Kaufman Co., Inc., 98 NLRB 353.

⁷Little Champ Manufacturers, Inc., *supra*.

supervisor as defined in the Act and exclude him from the unit.

Upon the entire record in this case, we find that the following employees of the Employer at its plant at San Fernando, California, constitute an appropriate unit within the meaning of Section 9 (b) of the Act: All spreaders and cutters, excluding all other production employees, shipping and office employees, maintenance employees, bundle girls, the patternmaker-cutter, and all other supervisors as defined in the Act.

Direction of Election

As part of the investigation to ascertain representatives for the purposes of collective bargaining with the Employer, an election by secret ballot shall be conducted as early as possible, but not later than 30 days from the date of this Direction, under the direction and supervision of the Regional Director for the Region in which this case was heard, and subject to Sections 102.61 and 102.62 of National Labor Relations Board Rules and Regulations, among the employees in the unit found appropriate in paragraph numbered 4, above, who were employed during the payroll period immediately preceding the date of this Direction of Election, including employees who did not work during said payroll period because they were ill or on vacation or temporarily laid off, and employees in the military services of the United States who appear in person at the polls, but excluding those employees who have since quit or been discharged for

cause and have not been rehired or reinstated prior to the date of the election, and also excluding employees on strike who are not entitled to reinstatement, to determine whether or not they desire to be represented, for purposes of collective bargaining, by Los Angeles Joint Board, Amalgamated Clothing Workers of America, AFL-CIO.

Dated: Washington, D. C., Dec. 31, 1956.

[Seal]

NATIONAL LABOR
RELATIONS BOARD,

BOYD LEEDOM,

Chairman,

ABE MURDOCK,

PHILIP RAY RODGERS,

STEPHEN S. BEAN,

Members.

[Received in evidence April 29, 1957, as General Counsel's Exhibit No. 5-D.]

RESPONDENT'S EXHIBIT No. 7

[Title of Board and Cause.]

EXCEPTIONS TO DECISION AND DIRECTION OF ELECTION AND MOTION FOR RECONSIDERATION

By telegram on January 3, 1957, notification was given by undersigned, acting in behalf of Moss-Amber Corporation, the Employer in the above-

entitled case, of intent to file Request for Reconsideration and Motion to Amend Decision and Direction of an Election. There follows the Employer's Exceptions to the Decision and Direction, argument sustaining the Employer's position thereto, and Motion to Reconsider and amend the Direction of Election.

Exceptions

Moss-Amber Corporation, hereinafter referred to as the "Employer," excepts to Board's Decision and Direction of Election in the following particulars:

1. (Paragraph 4, bottom of page one and top of page 2): "The Employer asserts that the requested unit is inappropriate and contends that the appropriate unit should include, in addition to the employees sought by the Petitioner, employees engaged in designing, spreading, cutting and pattern-making at the Employer's other plant at Los Angeles, California."

2. (Starting at 8th line from the bottom of page 2): "The approximately 25 employees include 5 office clericals, 6 or 7 folders, 3 pressers, 3 or four boxers, 3 or 4 shippers, a sewer, and 2 employees engaged in designing, spreading, cutting, and pattern-making."

3. (First paragraph, page 3): "Upon the entire record herein, and particularly in view of the geographical separation of the 2 plants, their different functions, the lack of employee interchange and bargaining history, and the fact that no labor or-

ganization currently seeks to represent employees at both plants, we find that a unit of employees limited to the San Fernando plant is appropriate."

4. (First paragraph, page 4): "Upon the entire record in this case, we find that the following employees of the Employer at its plant at San Fernando, California, constitute an appropriate unit within the meaning of Section 9 (b) of the Act: All spreaders and cutters, excluding all other production employees, shipping and office employees, maintenance employees, bundle girls, the pattern-maker-cutter, and all other supervisors as defined in the Act."

The Employer's Position With Respect to Above Exceptions

With reference to the first exception: The Employer does not seek to have designers included in the unit. There is nothing in the record wherein the Employer seeks a unit including designers. Testimony of the witness, Edward Moss, was to the effect that the Employer had but one designer, and that designer was Mr. Amber, president of the corporation. The record specifically states that the Employer does not seek to include Mr. Amber in the bargaining unit (p. 128 tr.). There is the possibility that the record is not entirely clear as to how many are engaged in designing and for that reason there follows a clarification.

Mr. Edward Moss, vice-president of the corporation, testified that he is in full charge of all produc-

tion and supervises all such activity, both at the San Fernando and Los Angeles locations. Mr. Moss testified (p. 17 tr.) that he had not previously given testimony "in Court." As a result of his inexperience, some of the answers he gave in response to questions were, inadvertently and not intentional, misleading. It is apparent Mr. Moss did not fully understand the scope of some of the questions.

(p. 14 tr.)

Q. (By Mr. Rissman, Union Counsel): How many are engaged in designing? (Referring to the Los Angeles location.)

A. (By Mr. Moss): Three; it varies, could be three, four, two.

(p. 15 tr.)

Q. How much was it of last week?

A. At the moment, there is three.

Q. Now, how many, if any, do cutting?

A. In the cutting, there is two.

Q. Who is in charge of the two who do the cutting? A. I am.

Q. We are talking now about the cutting that is done at the Los Angeles plant.

A. I supervise it.

Q. Who are those two people?

Further questioning developed the names of the two engaged in cutting at the Los Angeles location as Oscar Gallegos (p. 15 tr.) and Helen O'Brien (p. 21 tr.).

(p. 16 tr.)

Q. The designing is done by who?

A. Mr. Amber.

Q. Who are the other two in the designing department?

A. The answer I just gave you, one was Oscar and the other one I can't think of the name.

Q. I see; so Mr. Amber and Oscar Gallegos and one other man do designing and cutting?

A. Right.

Q. We have really only three people instead of five doing those operations; is that correct?

A. At the moment.

(p. 21 tr.)

Q. (By Mr. Rissman): Will you describe for us the work done by Oscar Gallegos and Helen O'Brien, and if their work is different, then describe each one separately?

A. Well, they integrate their work. They cut samples and they cut trim and collars and so on and so forth, whatever I send them to do, they do.

Q. In other words, you send the work to them from San Fernando? A. Yes.

Q. Do they do any marking?

A. What do you mean, marking; by that do you mean marking the patterns?

Q. Yes.

A. Well, Oscar makes some patterns and Helen does, too.

Q. Do they do any spreading?

A. They have to spread to cut.

From the foregoing testimony it could have been understood that there were three people engaged in designing. The Board's Direction reflects such an understanding. Mr. Moss enumerated the people in the department as three, or meant to do so, and a break-down of the duties clearly reveals that only one, Mr. Amber, does designing, and the other two, Gallegos and O'Brien, perform the usual functions of cutters in a garment factory, which includes pattern-making, spreading and cutting. (See the sworn statement of Mr. Moss attached hereto and made a part hereof, and identified as Exhibit 1.)

The Employer submits that Gallegos and O'Brien perform duties similar to the duties of the San Fernando employees and, further, that such duties are so integrated with the work at the San Fernando location, and with the cutting department there, that they are inseparable when considered as a unit, and that they should be included in any designation of an appropriate bargaining unit of cutters employed by the Employer. In support of this contention, the Employer calls attention to the following testimony:

(p. 55 tr.)

Q. (By Hearing Officer): What about the cutting that is performed in Los Angeles, do they perform any production cutting?

A. (By Mr. Moss): Yes. Well, when I say production, I should limit it to trim cutting, primarily, although they do some production cutting.

Q. By trim, do you mean collars and cuffs?

A. Collars and panels and other parts of the garment.

Q. I see, and those parts then would be shipped to San Fernando to be incorporated in the finished garment?

A. That's right.

From the above testimony, together with the sworn statement of Mr. Moss, there can be no doubt but that the work of the cutters in San Fernando and Los Angeles constitutes a single homogeneous unit. Neither location operates unilaterally; both cut part of the same garments manufactured for production; both are under the same supervision with direct telephone service between the two locations; the same materials and the identical garments are worked on at both places at various stages; the company records classify them as a single department (see Mr. Moss' sworn statement); all are on an hourly wage and enjoy the same vacation benefits; all are eligible for membership in the Petitioning Union (refer to testimony of Union Agent George Metalsky, p. 111 tr.) where eligibility is stated to be: "Anybody in the clothing industry that is a cutter."

Moss-Amber Corporation does not operate as two businesses under a single ownership, but as one integrated production unit with two locations. It has, in fact, one cutting department, operated partially at San Fernando and partially at Los Angeles for the sake of convenience only. Trim (which includes "collars and panels and other parts of the garment") is cut in larger proportion in the Los An-

geles location. However, trim is cut also in San Fernando. (See testimony of Mr. Moss, p. 30 tr., wherein he testified Aldo Baldwin at the San Fernando location cut "just trim.") On the other hand, the greater part, but not all, of the cutting of larger pieces, or what Mr. Moss termed "production cutting" is performed at the San Fernando location. Samples are cut and made at both locations.

It is difficult to envision an operation so closely integrated having a bargaining representative for some of its employees in a single department, but excluding other employees in the same department for no other reason than that their cutting tables happen to be separated by 25 miles. It is the contention of the Employer that all of its cutters should be entitled to bargaining representation, if any should be designated, and that a separation would provoke an unworkable and inefficient department. Mr. Moss, who is the supervisor of the entire cutting department, has discretionary authority to assign the work at either location and does so in manner to obtain the greatest efficiency and best utilize the time of the cutters.

The Employer cannot accept the Board's ruling of what constitutes an appropriate bargaining unit as tenable, and submits that it would create problems that would necessitate a change of production methods forcing it to do all the cutting in one location, either at San Fernando or Los Angeles. It submits further, that any insistence of a division of the employees, who have a community of interest and whose work largely complements one another,

could only be considered an arbitrary and capricious ruling, and the Employer would have no alternative but to seek relief from such a ruling in whatever manner is provided by law.

Motion to Reconsider and Amend Direction
for an Election

The Employer accepts the Board's ruling with respect to excluding the bundling girls who work in the cutting department, as well as the exclusion of the patternmaker-cutter at the San Fernando location who, the Board rules, is a supervisory employee.

The Employer moves to amend the Direction of an Election to include in one homogeneous group of skilled employees all spreaders and cutters employed by the Employer at its San Fernando and Los Angeles locations, and agrees that if that is done the unit then so designated will in fact constitute an appropriate unit within the meaning of Section 9 (b) of the Act.

Respectfully submitted,

/s/ MRS. EDWIN SELVIN,

MRS. EDWIN SELVIN,

For and in Behalf of Moss-
Amber Corporation.

Signed at Beverly Hills, Calif., this 19th day of January, 1957.

[Received in evidence April 29, 1957, as Respondent's Exhibit No. 7.]

RESPONDENT'S EXHIBIT No. 8

AFFIDAVIT

State of California,
County of Los Angeles—ss.

I, Edward Moss, being first duly sworn, do depose
and state:

I am the same Edward Moss who gave testimony
in the representation proceedings, titled 21-RC-
553, Moss-Amber Corporation, before a hearing
officer in the Regional Office of the National Labor
Relations Board on October 1, 1956. In an effort to
clarify the record I make the following statement:

I did not intend by my testimony to say that three
people were, on the day of the hearing, engaged in
designing in the Los Angeles location of our plant.
I merely meant that three people were, on the date
of such testimony, employed in what is sometimes
loosely termed "the designing department," but
which is actually part of our cutting department
(p. 14 tr.). This, I believe, is made clear by my
further testimony (p. 16 tr.) where I identified Mr.
Amber as the Designer, while the specific duties of
Oscar Gallegos and Helen O'Brien are detailed (p.
1 tr.) as follows: "Well, they integrate their
work. They cut samples and they cut trims and col-
lars and so on and so forth, whatever I send them
to do, they do." Neither has ever engaged in de-
signing for Moss-Amber Corporation. I again cor-
rectly stated what these two employees do, and
again, to clarify, I stated (p. 55 tr.) specifically

that they both cut for production, but that such production cutting is primarily limited to trim cutting, although this is not always the case, as indicated by the testimony. I defined trim as "collars and panels and other parts of the garment," and testified further that after they were cut such parts are shipped to the San Fernando location to be incorporated into the finished garment. I was not asked the question and so I did not testify to the further fact that approximately 60% of all the trim incorporated in the garments manufactured for production is cut by the cutting department employees in Los Angeles.

During the term of employment of Aldo Baldwin at the San Fernando location I testified (p. 30 tr.) that he was cutting "just trim," and that he was employed (pgs. 70 and 71 tr.) to help out during the vacation of regularly employed cutters.

The record is abundantly clear that the two locations, San Fernando and Los Angeles, are not two business operated under one ownership, but one business operated as a single integrated unit, and occupying two locations only for convenience. In the case of the cutting department it is a single department, partly in San Fernando and partly in Los Angeles. I testified that all accounting and payroll records are kept in Los Angeles. Payroll records are segregated by departments and San Fernando cutters and Los Angeles cutters are segregated together from the other classifications as one department, as our payroll records will reveal.

The actual work done in each location, insofar as cutting operations are concerned, is so integrated that while San Fernando may cut fronts, backs, sleeves, etc., Los Angeles will cut, trim collars, panels, etc., for the self-same garments which are manufactured for production. The reason, and the only reason, for confining the larger part of the trim to the Los Angeles location, is that trim cutting (pgs. 70 and 71 tr.) requires less space than is required for other parts of the garment, and since we have less cutting space in Los Angeles it is a matter of convenience only. Other than samples, which are made at both locations, it is safe to say that most of the garments manufactured for production have some work performed by the cutters in San Fernando and some by the cutters in Los Angeles. There are no garments manufactured for production made wholly and completely at either location. It requires both locations to complete each and every garment manufactured for production, and this is particularly true of the cutting operation.

As I testified, I supervise all cutting operations. There is direct telephone service between the San Fernando cutting department and the Los Angeles cutting department to facilitate this. There is also a truck goes back and forth taking materials from one cutting department to another. The work of the two locations is quite thoroughly intermingled. The work at both locations could just as well be consolidated in a single building, or a single room for

that matter, and the end result would be the same. Many factors have entered into the division of the work into two locations or two buildings to effectuate a single production unit, such as availability of certain types of employees, shipping centers, showroom facilities close to markets, space requirements involving overhead, and many others. But the fact remains that there is but one cutting department, part of the tables being located in San Fernando and part in Los Angeles, and only limitation of space determining which part of the garment is cut in San Fernando and which is cut in Los Angeles. If there were to be an elimination of the functions of either of the two locations, as at present operated, there could be no production whatever, since the work at the two locations is so closely integrated.

There is the further fact that the Union has been and is, attempting to enlist as members the employees in the Los Angeles location of the cutting department. Union organizers have entered the premises of the Los Angeles location and have solicited our cutters employed there to become members—with what success I do not know. This has occurred on several occasions since the inception of this proceeding and prior to the Board's Decision and Direction of Election. I personally have seen cards for membership signature which were handed out on our premises in Los Angeles.

Finally, there is no significance whatsoever in the fact that there is no interchange of employees be-

tween San Fernando and Los Angeles. There are cutting facilities at both locations. The work can be done either place, and it is done in either place as I assign it in manner to keep the cutters at both locations busy. Naturally, the assignments are made with space limitations (the smaller cutting area specifically) in Los Angeles, which results in the greater portion of the larger pieces, requiring more space, being cut in San Fernando, and the trim, requiring less space, being made in larger proportion in Los Angeles.

/s/ EDWARD MOSS.

Subscribed and sworn to this 18th day of January, 1957, before me, a Notary Public in and for the State of California, County of Los Angeles.

[Seal] /s/ GLADYS W. TUCKER.

My Commission Expires August 5, 1960.

[Received in evidence April 29, 1957, as Respondent's Exhibit No. 8.]

GENERAL COUNSEL'S EXHIBIT No. 5-8

United States of America
National Labor Relations Board

[Title of Cause.]

"Non D"

Type of Election: Board Ordered.

CERTIFICATION OF REPRESENTATIVES

An election having been conducted in the above matter by the undersigned Regional Director of the

National Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the National Labor Relations Board,

It Is Hereby Certified that Los Angeles Joint Board, Amalgamated Clothing Workers of America, AFL-CIO, has been designated and selected by a majority of the employees of the above-named Employer, in the unit herein involved, as their representative for the purposes of collective bargaining, and that, pursuant to Section 9 (a) of the Act as amended, the said organization is the exclusive representative of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Signed at Los Angeles, California, on the 11th day of February, 1957.

On behalf of,

[Seal]

NATIONAL LABOR
RELATIONS BOARD,

/s/ HENRY W. BECKER,

Regional Director for Twenty-first Region, National
Labor Relations Board.

Received in evidence April 29, 1957, as General
Counsel's Exhibit No. 5-H.

United States of America
Before the National Labor Relations Board
Case No. 21-CA-2657

MOSS-AMBER MFG. CO.

and

LOS ANGELES JOINT BOARD, AMALGA-
MATED CLOTHING WORKERS OF
AMERICA, AFL-CIO

DECISION AND ORDER

On May 21, 1957, Trial Examiner David F. Doyle issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed.¹ The rulings are

¹On the ground that the Respondent could not relitigate in this proceeding issues which had been decided in the prior representation proceeding, 116

hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Moss-Amber Mfg. Co., San Fernando, California, its officers, agents, successors, and assigns, shall:

NLRB 1998, the Trial Examiner at the hearing herein excluded, *inter alia*, certain evidence which the Respondent asserts was newly discovered and therefore admissible. The Respondent further asserts that such evidence, pertaining to alleged efforts by the Union to organize employees in addition to those included in the appropriate unit, would establish that such unit was inappropriate under Section 9 (c) (5) of the Act because it was based on the Union's extent of organization. Section 9 (c) (5), however, precludes the Board only from giving controlling weight to extent of organization, and the findings made in the representation case show that the Board's unit determination in that case was affirmatively supported by clear and decisive evidence wholly unrelated to extent of organization. In these circumstances, the allegedly newly discovered evidence, even if admitted, would not affect the validity of the Board's unit determination in the representation proceeding or our agreement therewith. See *The Employers' Liability Assurance Corporation, Ltd.*, 117 NLRB 92; *Kwikset Locks, Inc.*, 116 NLRB 1648. Accordingly, the Trial Examiner's ruling, even if assumed to be erroneous, was not prejudicial.

1. Cease and Desist From:

(a) Refusing to bargain collectively with the Los Angeles Joint Board, Amalgamated Clothing Workers of America, AFL-CIO, as the exclusive representative of all spreaders and cutters employed by the Respondent at its San Fernando, California, plant, excluding all other production employees, shipping and office employees, maintenance employees, bundle girls, the patternmaker-cutter, and all other supervisors as defined in the Act;

(b) In any other manner interfering with the efforts of the Los Angeles Joint Board, Amalgamated Clothing Workers of America, AFL-CIO, to bargain collectively with it in behalf of the employees in the appropriate unit.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request bargain collectively with the Los Angeles Joint Board, Amalgamated Clothing Workers of America, AFL-CIO, as the exclusive bargaining representative of all the employees in the appropriate unit with respect to wages, rates of pay, hours of employment, or other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement;

(b) Post at its plant in San Fernando, California, copies of the notice attached hereto, marked

Dated:

By.....,
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

David F. Doyle, Trial Examiner.

Statement of the Case

This proceeding, brought under Section 10 (b) of the Act, was heard at Los Angeles, California, on April 29, 1957, pursuant to due notice to all parties.¹ The complaint, dated April 1, 1957, was issued by the General Counsel and duly served on the Company. The complaint alleged in substance that the Company on or about February 15, 1957, and thereafter, refused to bargain collectively with the Union,

¹In this report, Moss Amber Mfg. Co. is referred to as the Company; Los Angeles Joint Board, Amalgamated Clothing Workers of America, AFL-CIO, as the Union; the General Counsel of the Board and his representative at the hearing, as the General Counsel; the National Labor Relations Board, as the Board; and the Labor Management Relations Act of 1947, as amended, as the Act.

which was the certified bargaining representative of the Company's employees in an appropriate unit, and that by such conduct the Company had violated Sections 8 (a) (1) and (5) of the Act. The Company duly filed an answer denying the commission of the alleged unfair labor practices, and asserting as a defense that the bargaining unit defined by the Board in its Decision and Direction of Election in a representation case between the parties (Moss-Amber Mfg. Co., 116 NLRB No. 286) was in fact inappropriate, and that the Board's finding as to unit was "illegal and contrary to the express provisions of the Act."

At the hearing all parties were represented, were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues, to argue the issues orally upon the record, and to file briefs and proposed findings.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of the Company

Upon the pleadings, and a stipulation made at the hearing as to certain facts of the Company's business, I find that the Company is a California corporation engaged in San Fernando and Los Angeles, California, in the manufacture of men's sport shirts. The Company annually ships directly to

points located outside the State of California products valued in excess of \$50,000.

Upon all the evidence, including that produced in the prior representation case between the parties, *supra*, of which I hereby take judicial notice, I find that the Company is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

II. The Labor Organization Involved.

Upon all the evidence, I find that Los Angeles Joint Board, Amalgamated Clothing Workers of America, AFL-CIO, is a labor organization admitting to membership employees of the Company.

III. The Unfair Labor Practices

A. Introduction: the Representation Proceeding

The sole issue in the instant proceeding is whether the Company has refused to bargain collectively with the Union and has thereby violated Section 8 (a) (1) and (5) of the Act.

As well be seen below, the Company asserts as a defense to its refusal to bargain, the contention that the unit has found by the Board in its Decision and Direction of Election in *Moss Amber Corporation and Los Angeles Joint Board, Amalgamated Clothing Workers of America, AFL-CIO*, 116 NLRB No. 286, is not appropriate, and that, in consequence, the Company was under no duty to bargain with the Union. A short review of the representation proceeding will demonstrate that the contentions of

the Company on the unit issue have been heard and determined by the Board in that proceeding.

On September 5, 1956, the Union filed a petition requesting certification of representative for a unit of the Company's employees at its San Fernando plant described as, "all cutters," excluding specifically all other production employees, shipping and office employees, maintenance employees, and supervisory employees, as defined in the Act. Pursuant to notice, a representation proceeding was conducted before a hearing officer at Los Angeles, California, on October 1, 1956. A full opportunity was afforded all parties to present evidence. At the hearing, the Company assumed the position that: (1) The proposed unit was inappropriate because it did not include employees working for the Company at its Los Angeles plant which, according to the testimony of the Company's witnesses, was integrated with the San Fernando plant; and (2) that the unit of employees at the San Fernando plant should include bundle girls, the patternmaker-cutter, and others.

On December 31, 1956, the Board issued its Decision and Direction of Election in the representation case finding that the following employees of the Company at its plant at San Fernando, California, constituted an appropriate unit within the meaning of Section 9 (b) of the Act: All spreaders and cutters, excluding all other production employees, shipping and office employees, maintenance employees, bundle girls, the patternmaker-cutter, and all other supervisors as defined in the Act.

On January 30, 1957, pursuant to the Direction of Election, an election by secret ballot was conducted under the supervision of the Regional Director of the Twenty-first Region. Of the three voters eligible to vote in the election, two voted in favor of the Union. On February 11, 1957, the Regional Director issued to the Union a certification of representative covering the unit.

B. The Refusal to Bargain

After the Union had received its certification, on February 12, 1957, Jerome Posner, its manager, by letter notified the Company that it had received its certification and that it would like to arrange a meeting with a representative of the Company for the purpose of engaging in collective bargaining.

On February 15, 1957, Mrs. Edwin Selvin replied to Posner's letter of February 12, 1957. Mrs. Selvin's letter reads as follows:²

Dear Sir:

Your certified mail, special delivery letter, addressed to Mr. Edward Moss of Moss-Amber Corporation, has been forwarded to me for reply.

As you are aware, we made formal objection to the Board's ruling as to the appropriate bargaining unit of employees. We did not participate in the election, nor allow it to be held on company premises, nor did we post the notices of such election. Nor will we now recognize the certification issued as a

²General Counsel's Exhibit No. 4.

result of the election held outside the company's plant.

This action is taken pursuant to Section 10 (f) of the National Labor Relations Act, which section provides the means by which our objections may be reviewed by a United States Circuit Court or by the United States Court of Appeals. When and if a "final Order of the Board" issues, after hearing of our refusal to bargain, it is our intention to invoke this right of a Court review of our objections.

In the meantime, you may consider this letter refusal to meet and discuss any terms of a contract.

Yours truly,

On February 20, 1957, the Union filed the instant charge against the Company. At the hearing, the Company assumed the position that it sought a review of the Board's decision on the question of appropriate unit by the Board and the Courts, and that its refusal to bargain was the procedure required to raise that question. Counsel for the Company also sought to introduce into evidence certain exhibits, and proffered certain testimony, bearing on certain phases of the question of appropriate unit. The General Counsel objected to the receipt in evidence of these exhibits, and the testimony of these witnesses proposed by the Company, on the ground that the exhibits and testimony all related to issues in the representation proceeding, which had been litigated, and that the Company was trying to use the present proceeding to relitigate matters

which were res adjudicata. The Trial Examiner sustained the objection of the General Counsel, on the ground that it has long been the policy of the Board not to permit a respondent to relitigate, in a subsequent unfair labor practice proceeding involving charges of a refusal to bargain with a certified representative, the issues decided in a prior representation proceeding.³

In consequence of the rejection of these exhibits⁴ and the preclusion of this testimony, no further defense was interposed by the Company.

Therefore, upon the evidence as a whole, I find that on or about February 15, 1957, and at all times thereafter, the Company has refused, and is refusing, to bargain collective with the Union as the exclusive representative of its employees in an appropriate unit, and has thereby interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

³N. L. R. B. v. Worcester Woolen Mills Corp., 170 F. 2d 13 (C.A. 1) cert. denied 336 U. S. 903; Pittsburgh Plate Glass Co. v. N. L. R. B., 313 U. S. 146; Allis-Chalmers Manufacturing Co. v. N. L. R. B. 162 F. 2d 435 (C.A. 7); N. L. R. B. v. West Kentucky Coal Company, 152 F. 2d 198 (C.A. 6) cert. denied 328 U. S. 866; N. L. R. B. v. Anwelt Shoe Manufacturing Co., 93 F. 2d 367 (C.A. 1).

⁴The rejected exhibits were marked for identification, Respondent's Exhibits Nos. 1-6. They may be found in the file of Rejected Exhibits. In that connection see transcript of testimony, pages 28-31. See also, testimony of Griselda Kuhlman, page 25, and Edward Moss, page 40, as to testimony ruled inadmissible.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Company set forth in Section III above, occurring in connection with the operations of the Company described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Company has engaged in certain unfair labor practices, it will be recommended that the Company cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having also found that the Union represented, and now represents, a majority of the employees in the appropriate unit, and that the Company has refused to bargain collectively with it, the undersigned will recommend that the Company upon request bargain collectively with the Union.

Upon the basis of the above findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. Los Angeles Joint Board, Amalgamated Clothing Workers of America, AFL-CIO, is a labor or-

ganization within the meaning of Section 2 (5) of the Act.

2. All spreaders and cutters employed by the Company at its San Fernando plant, excluding all other production employees, shipping and office employees, maintenance employees, bundle girls, the patternmaker-cutter and all other supervisors as defined in the Act, form a unit appropriate for the purposes of collective bargaining.

3. The above-named Union was on February 11, 1956, and at all times thereafter has been and is, the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

4. By refusing on February 15, 1957, and at all times thereafter to bargain collectively with the Union as the exclusive representative of all its employees in the aforesaid appropriate unit, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (5) of the Act, as amended.

5. By the aforesaid refusal to bargain, the Company has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (1) of the Act, as amended.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that the Respondent, Moss Amber Mfg. Co., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Los Angeles Joint Board, Amalgamated Clothing Workers of America, AFL-CIO, as the exclusive representative of all spreaders and cutters employed by the Company at its San Fernando plant, excluding all other production employees, shipping and office employees, maintenance employees, bundle girls, the patternmaker-cutter and all other supervisors as defined in the Act;

(b) In any other manner interfering with the efforts of the Los Angeles Joint Board, Amalgamated Clothing Workers of America, AFL-CIO, to bargain collectively with it in behalf of the employees in the aforesaid appropriate unit.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Upon request bargain collectively with the Los Angeles Joint Board, Amalgamated Clothing Workers of America, AFL-CIO, as the exclusive bargaining representative of all the employees in

the aforesaid appropriate unit with respect to wages, rates of pay, hours of employment, or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement;

(b) Post at its plant in San Fernando, California, copies of the notice attached hereto, marked Appendix A. Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Company's representative, be posted by the Company immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Twenty-first Region in writing within twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order what steps the Company has taken to comply herewith.

It is further recommended that, unless on or before twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order the Company notify the said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board

issue an order requiring the Company to take the action aforesaid.

Dated this 21st day of May, 1957.

/s/ DAVID F. DOYLE,
Trial Examiner.

[Title of Board and Cause.]

EXCEPTIONS TO INTERMEDIATE REPORT,
RECOMMENDED ORDER AND TO VARIOUS
RULINGS OF THE TRIAL EX-
AMINER

Comes now the Respondent and notes the following exceptions to the Intermediate Report, Recommended Order and Rulings of the Trial Examiner:

I.

Respondent excepts to the findings in the Intermediate Report, page 1, lines 3 and 4, from the bottom thereof that: The parties "were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues," and in this connection alleges it was precluded from offering evidence material to the issues, and was denied due process by the Trial Examiner's rulings.

II.

Respondent excepts to the finding page 2, lines 23 to 25, that: "Upon all the evidence I find that Los Angeles Joint Board, Amalgamated Clothing

Workers of America, AFL-CIO, is a labor organization admitting to membership employees of the Company.”

III.

Respondent excepts to the finding, page 2 of the Intermediate Report, lines 40 to 44, that: “A short review of the representation proceeding will demonstrate that the contentions of the company on the unit issue have been heard and determined by the Board in that proceeding.”

IV.

Respondent excepts to the finding, page 4 of the Intermediate Report appearing at lines 17 through 23, that the company refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, and thereby interfered with the exercise of rights guaranteed in Section 7 of the Act.

V.

Respondent excepts to all conclusions of law set forth in said Intermediate Report, page 5, lines 1 through 33.

VI.

Respondent excepts to the Trial Examiner’s denial of Respondent’s motion to dismiss, pages 22-23, Rep. Tr.

VII.

Respondent excepts to the Trial Examiner’s statement, page 27, lines 13 and 14, Rep. Tr.: “Now, I do not know of any evidence I might take that would show that the unit was inappropriate.”

VIII.

Respondent excepts to the Trial Examiner's exclusion of evidence to the effect that the charging Union was attempting to organize other employees, including operators, bundlers, and all others at the San Fernando Plant, as well as the cutters at the Los Angeles Plant, and that the above employees were all eligible for membership in the charging Union. Rep. Tr. page 29, lines 2 through 15; page 30, lines 9 to 11.

IX.

Respondent excepts to the Trial Examiner's exclusion of evidence to the effect that before and after the original petition was signed the charging Union was attempting to organize not only cutters but operators and all classifications of employees in the employer's plants, both in Los Angeles and San Fernando, Rep. Tr., page 32, lines 22 to 24.

X.

Respondent excepts to the Trial Examiner's exclusion of evidence to the effect that the charging Union passed out organizational leaflets to all employees at the San Fernando Plant, and not to cutters and spreaders alone, prior to the date when it filed the original petition for certification; that said Union passed out organizing leaflets and authorization cards to employees at the Los Angeles Plant of Respondent prior to the direction of election; that the charging Union passed out organizing leaflets and authorization cards to all employees at Respondent's San Fernando Plant during April of

in *Allis Chalmers Mfg. Co. v. NLRB*, 162 F. 2nd, 435, when it stated: "There was no claim that the testimony thus proposed to be introduced was newly discovered testimony not available or known to petitioner at the time of the representation hearing." In the instant case such claim was made by the Respondent. (See Rep. Tr., pg. 34, lines 23 to 26; pg. 35, lines 1 to 3; pg. 36, lines 7 and 8.)

In view of the foregoing, it is submitted that the rulings of the Trial Examiner excluding such evidence was error, and the Respondent was thereby denied a fair hearing.

Prior to 1947 the Board in some instances had found a bargaining unit appropriate upon the basis of the extent to which the employees had organized. The Act was then amended by Congress, and Section 9 (c) (5) was added which reads as follows:

"In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling." It was to this provision that Respondent alluded when it stated in its answer that the bargaining unit claimed was illegal and contrary to the express provisions of the Act. It is Respondent's contention that inevitably under the procedure followed by the charging Union, the extent to which the employees organized became controlling in the determination of the bargaining unit. The charging Union, although it admits to member-

ship all production employees employed by Respondent and historically has organized along industrial rather than craft lines, filed a petition requesting a unit comprising only a small class of Respondent's employees. No disclosure was made of the fact that prior to that time the petitioning Union had attempted to organize the other employees of Respondent, although this was a fact peculiarly within the knowledge of said Union. Under the circumstances what basis other than the extent of organization could exist for the claiming of such a unit? It would seem that the Board, charged with the Congressional mandate quoted above, should have made some inquiry or investigation into the reason for the filing of the petition in the instant case. Corroborative of the fact that extent of organization was controlling in the filing of the petition is the further efforts of the charging Union during and since the Board's consideration of the unit question to organize other employees of the Respondent. It seems clear that the Congressional intent was to prevent piece-meal organization of an employer such as the Respondent, with its resultant inconvenience, expense and duplication of effort by employer and Board. If the charging Union continues to follow its present procedure, then we could expect petitions from the charging Union for bundlers, operators, shippers and pressers as each in turn might organize.

Ironically, one of the reasons advanced by the Board for finding the unit appropriate in the rep-

resentation case was "the fact that no labor organization currently seeks to represent employees at both plants." But for the Trial Examiner's exclusion of evidence the record in this case would show that the charging Union was seeking that very thing when the decision issued. Certainly there should have been disclosure by the charging Union at that time of its own efforts contrary to the Board's finding.

It is submitted that the amendment to the Act set out above in effect removes the determination of a bargaining unit from the Board's jurisdiction when extent of organization is the controlling factor. It is fundamental that a lack of jurisdiction may be urged at any time and at any stage of a quasi-judicial or judicial proceeding. It is therefore respectfully submitted that the record fails to disclose the commission of any unfair labor practices.

Respondent therefore prays that the complaint be dismissed.

Respectfully submitted,

/s/ FRANK A. MOURITSEN,
For Respondent Company.

Affidavit of Service by Mail attached.

Received June 13, 1957.

GENERAL COUNSEL'S EXHIBIT No. 5-I

Before the National Labor Relations Board
Twenty-first Region

Case No. 21-RC-4553

In the Matter of:

MOSS AMBER,

Employer,

and

LOS ANGELES JOINT BOARD, AMALGA-
MATED CLOTHING WORKERS OF
AMERICA, AFL-CIO,

Petitioner.

Monday, October 1, 1956

Pursuant to notice, the above-entitled matter came
on for hearing at 10:00 o'clock a.m.

Before: Irving Lebling, Hearing Officer.

Appearances:

MRS. EDWIN SELVIN,

Appearing on Behalf of Moss Amber, the
Employer.

WIRIN, RISSMAN AND OKRAND, by
ROBERT R. RISSMAN,

Appearing on Behalf of Los Angeles Joint
Board, Amalgamated Clothing Workers
of America, AFL-CIO, the Petitioner.

MISS GRISELDA KUHLMAN,

Appearing on Behalf of the Los Angeles
Joint Board, Amalgamated Clothing
Workers of America, AFL-CIO, the Pe-
titioner.

* * *

Hearing Officer: At this time, I would like to propose a few stipulations which I believe we can enter into.

First, may it be stipulated that the petitioner, the Los Angeles Joint Board of Amalgamated Clothing Workers of America, AFL-CIO, is a labor organization within the meaning of the National Labor Relations Act?

Mrs. Selvin: So stipulated.

Mr. Rissman: So stipulated.

Hearing Officer: May it also be stipulated that the company will not recognize the petitioner as the collective bargaining representative of certain of its employees unless, and until it is certified by the National Labor Relations Board?

Mrs. Selvin: So stipulated.

Mr. Rissman: So stipulated.

Hearing Officer: May it also be stipulated that the employer here involved, Moss Amber, is engaged in the manufacture of men's sportswear, that during the preceding 12-month period it shipped to points outside the State of California, having a value in excess of \$50,000.00?

Mrs. Selvin: So stipulated. [7*]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Rissman: So stipulated. [8]

* * *

EDWARD MOSS

a witness called by and on behalf of the Petitioner,
being first duly sworn, was examined and testified
as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your full name?

A. Edward Moss.

Q. What is your business, Mr. Moss?

A. Manufacturer of sport shirts.

Q. Are you an officer of the Moss-Amber Cor-
poration? A. I am. [9]

Q. What office do you hold?

A. Vice president.

* * *

Q. Are you actively engaged in the running of
the business? A. Yes.

Q. Where is your plant located?

A. We have two plants, one in Los Angeles and
one in San Fernando.

Q. Where is the Los Angeles plant located?

A. 1626 South Wall.

Q. What operations are carried on at the Los
Angeles plant?

A. Well, we have several operations, primarily
at the office [10] and showroom, pressing, folding,
cutting, making samples, we have an integrated op-
eration with the San Fernando plant.

(Testimony of Edward Moss.)

Q. You do any sewing operations at the Los Angeles plant? A. Yes.

Q. Just samples or for production?

A. Primarily samples. In case we have to make a few garments, we make them.

Q. But your normal production—

A. Our normal production is samples, repairs and altering in Los Angeles.

Q. But your normal sewing of shirts, other than what you have just described is done at the San Fernando plant? A. The majority, yes.

Q. Where is the San Fernando plant located?

A. 1825 First Street, San Fernando.

Mr. Rissman: May it be stipulated that the plant at 1825 First Street, San Fernando, California, is the one involved in this proceeding?

Mrs. Selvin: We will not so stipulate. We believe the employees of this employer are located in—we believe the employees of either one of the plants of this employer are entirely participating in this election.

Mr. Rissman: Mrs. Selvin, so that we understand your position, is it the company's position that the appropriate unit shall include the employees of both the San Fernando [11] plant as well as the Los Angeles plant?

Mrs. Selvin: Where there are employees in the unit, whether it is—we believe that where there are employees that perform the duties for this company at the downtown plant, it is this integrated opera-

(Testimony of Edward Moss.)

tion, and the privilege and opportunity of voting in the election.

Mr. Rissman: All right.

Q. (By Mr. Rissman): Where do you make your principal place of business, San Fernando?

A. San Fernando.

Q. How much time do you spend there each week? A. Considerable.

Q. Well, assuming the factory works 40 hours a week, how much time do you spend there?

A. Fifty.

Q. How many employees do you have in the Los Angeles office? [12]

* * *

The Witness: I can only answer approximately, I don't know exactly how many people. I assume that there is possibly 30.

Q. (By Mr. Rissman): Approximately 30?

A. Yes.

Q. Now, as vice president of the corporation, are you its principal administrative officer?

A. I share all duties with Mr. Amber.

Q. Where does Mr. Amber make his headquarters? A. 1626 South Wall.

Q. That is the Los Angeles office? A. Yes.

Q. Of these approximately 30 people, how many are office workers?

A. I believe there is five.

Q. How many sales people?

A. No salesmen are included in it.

Q. How many are engaged in designing?

(Testimony of Edward Moss.)

A. Three; it varies, could be three, four, [14] two.

Q. How much was it as of last week?

A. At the moment, there is three.

Q. Now, how many, if any, do cutting?

A. In the cutting, there is two.

Q. Who is in charge of the two who do the cutting? A. I am.

Q. We are talking now about the cutting that is done at the Los Angeles plant?

A. I supervise it.

Q. Who are those two people?

Mrs. Selvin: I object to that question, Mr. Hearing Officer. The number of people is proper issue to bring before the Board, but by name, they should be brought into the hearing, I believe that cannot be material.

Hearing Officer: Overruled.

The Witness: You want me now to give you the name of the two people?

Q. (By Mr. Rissman): Yes.

A. That are in the cutting?

Q. At Los Angeles.

A. At Los Angeles, one is Oscar G-a-l-l-e-g-o-s, Gallegos.

Q. Who is the other? A. What?

Q. Who is the other?

A. The other is—I can't think of the name at the moment, [15] but it will come to me. I didn't come prepared with all names.

(Testimony of Edward Moss.)

Hearing Officer: All right. Well, if it comes to you, Mr. Moss, let us know.

Q. (By Mr. Rissman): If you have any papers or records in your pocket or briefcase or in the hearing room, feel free to refer to them.

A. I didn't bring any.

Mrs. Selvin: I did not request him to bring any names.

Q. (By Mr. Rissman): The designing is done by who? A. Mr. Amber.

Q. Who are the other two in the designing department?

A. The answer I just gave you; one was Oscar and the other one I can't think of the name.

Q. I see; so Mr. Amber and Oscar Gallegos and one other man do designing and cutting?

A. Right.

Q. We have really only three people instead of five doing those operations; is that correct?

A. At the moment?

Q. Yes. A. Yes.

Q. Now, you say there are also some folding operations? A. Yes.

Q. Pressing? A. Yes. [16]

Q. Sample making? A. Yes.

Q. Any other operations at Los Angeles?

A. Boxing, shipping, selling.

Q. Boxing, shipping, selling. All right.

How many folding people?

A. Do I have to answer that, too?

Q. Unless the Hearing Officer tells you——

(Testimony of Edward Moss.)

A. It is the first time I have been in court.

Mrs. Selvin: I am going to object to that on the ground there is no materiality, there is no contention that the four people who do folding are involved in this hearing.

Hearing Officer: I am going to overrule the objection, Mrs. Selvin. I think Mr. Rissman, that we need not go into the names of the persons in these other categories because nobody is contending that they are in the unit.

Mr. Rissman: I wasn't asking for that. I also want to get to the point of interrelationship between the unit of the cutters we seek and the San Fernando plant, and any other employees of the corporation, wherever they may be.

Hearing Officer: Approximately how many persons are engaged in folding?

The Witness: It varies, depending on the amount, around six, seven.

Q. (By Mr. Rissman): Well, when they are not doing folding, [17] do they do anything else?

A. They help with the boxing, something in their department primarily.

Q. Which department?

A. They have nothing to do with the cutting.

Q. Which department would you call that, folding and boxing?

A. Folding, boxing, helping to ship.

Q. How many in the pressing?

A. In the pressing we have three.

Q. How many sample?

(Testimony of Edward Moss.)

A. Well, you mean sewing, one.

Q. One?

A. Yes. Of course, you are talking about L. A.?

Q. That's right, we are just limiting ourselves to Los Angeles.

A. Because we make samples in San Fernando.

Q. How many in boxing?

A. Boxing, there is approximately three or four.

Q. And shipping? A. Three or four.

Q. Is that the same three or four? A. No.

Q. Selling, you have here?

A. Well, Mr. Amber—if a customer walks in, we sell; we try to.

Q. You do some selling at the place, and that is Mr. Amber's—— [18]

A. That is his primary——

Q. Are there any other employees of any kind employed by your corporation in the Los Angeles plant?

A. What do you mean by that, some other duty?

Q. Duties, yes?

A. That work in the plant, are you referring to salesmen that work outside?

Q. Are there outside salesmen?

A. Yes. We have outside salesmen across the country.

Q. That are employed directly by you or are they employed through selling agencies?

A. They are employed by us.

Q. Outside salesmen in various parts of the United States, is that right? A. Yes.

(Testimony of Edward Moss.)

Q. Do you have any truck drivers?

A. Special truck drivers?

Q. I don't know what you mean by special.

A. What do you mean by truck drivers?

Q. A person who drives a truck.

A. We have a truck.

Q. You have a truck? A. Yes.

Q. Who drives it?

A. One of our cutters. [19]

Q. One of the cutters? A. Yes.

Q. Which one? Is this one of the Los Angeles cutters?

A. No; one of the San Fernando cutters, but we change that off now and then. At the moment, he has been driving it for some time, take the truck away from him and give it to somebody else. You are asking right now, he is the one who drives it now.

Q. Do you ever employ a person who does nothing but truck driving? A. No.

Q. Do you have any janitors or maintenance men of any kind in the Los Angeles operation?

A. Yes.

Q. How many?

A. But that is all they do is—we don't have anybody; that is all they do, is janitor work. One of the boys in the shipping—

Q. The shipping room employees do some of the janitor work? A. Yes.

Q. Do you have any maintenance people, machinists?

(Testimony of Edward Moss.)

A. Not specially for the few machines.

Q. Have—how long have Oscar Gallegos and the other cutter whose name you don't recall been working in the Los Angeles plant? [20]

A. Well, one has only been there—Oscar has only been there a few weeks, but the other one, a few years.

Q. That is the fellow whose name you can't recall?

A. It will come to me.

Q. Do you recall his first name?

A. A girl, Helen O'Brien.

Q. Helen O'Brien has been there a few years, you say?

A. Yes.

Q. Will you describe for us the work done by Oscar Gallegos and Helen O'Brien, and if their work is different, then describe each one separately?

A. Well, they integrate their work. They cut samples and they cut trims and collars and so on and so forth, whatever I send them to do, they do.

Q. In other words, you send the work to them from San Fernando?

A. Yes.

Q. Do they do any marking?

A. What do you mean, marking; by that do you mean marking the patterns?

Q. Yes.

A. Well, Oscar makes some patterns and Helen does, too.

Q. Do they do any spreading?

A. They have to spread to cut.

Hearing Officer: Could you tell me what spreading is? [21]

(Testimony of Edward Moss.)

The Witness: Spreading is, what you have, a cutting ticket, the spreader spreads the goods and—in the amount that you want, so many smalls in each color, they spread it out on the table, the cutters cut it out.

Q. (By Mr. Rissman): Was Oscar Gallegos employed by you at the San Fernando plant?

A. No.

Q. How long have you had two cutters in Los Angeles?

A. Well, I had one for several years and one for a few months, few weeks. [22]

* * *

Q. (By Mr. Rissman): Before Mr. Gallegos was hired, for how long a period did you have only one cutter employed at the Los Angeles plant, and I am leaving Mr. Amber out of this?

A. Well, we had only one cutter for some time, periodically we would break somebody in.

Q. Some time, six months, a year?

A. I think about a year, although periodically, if we need somebody, we call them in to help out.

Q. I see. Now, getting to the San Fernando plant, what operations are performed there?

A. Cutting, make and trim.

Q. I understand it, and I think Mr. Helbling does, but whoever is going to read this in Washington probably—will you take the operations and—

A. Do you want a list of them, because there are lots of operations?

(Testimony of Edward Moss.)

Q. Let's start—what is the first operation, cutting?
A. Cutting.

Q. How many cutters?

A. Well, actually the first operation is pattern making and markers.

Q. All right. Pattern making and marking; how many people? [23]

A. We have one. Are you talking about San Fernando?

Q. Yes. A. One that does most of that.

Q. Who is that, you?

A. No; I don't do that.

Q. Who is it? A. That is Jack Ritzma.

Q. How do you spell his last name?

A. R-i-z-t-m-a.

Do I have to name all these people?

Hearing Officer: I don't think we are going to have to name all them by any manner.

The Witness: I don't want everybody bothered in the place because of this thing.

Q. (By Mr. Rissman): Let me say this, Mr. Moss: Whether you name them or not, those who are going to be visited in their houses will be visited in their houses; that is not the purpose of asking the names. The purpose of asking the name here is so we identify the occupations; for example, Mr. Ritzma is a foreman, is he not?
A. No.

Q. What are his duties?

A. His duties are the pattern making and marking.

Q. What are his other duties? A. Cutting.

(Testimony of Edward Moss.)

Q. What else? [24] A. That is it.

Q. How long has he been employed by you?

A. Several years.

Q. What does he have to do with engaging new cutters or employees?

A. Well, if I need any cutters, I talk it over with Jack, and we get together, somebody comes to work for us; we decide whether we want him or not, but he doesn't have the right to hire or fire.

Q. In other words, all he can do is recommend to you and you act on his recommendations?

A. Of course, if the man doesn't work out, he is just fired. He can recommend like anybody else can recommend that I hire. His word is not 100 per cent. I am the judge whether the man is hired or fired.

Q. You rely on his recommendations?

A. As well as the other people.

Q. Let's talk about him, Mr. Moss.

A. Well, he is——

Q. Wait; let me tell you something. You have hired a lady to represent you. Let her argue the case, you just answer the questions as to the facts. I didn't ask you about anybody else in the plant, I asked you about Jack Ritztma. Do you rely on his recommendation on hiring and firing?

A. To a degree. [25]

* * *

Mr. Rissman: The purpose of this is to show that Jack Ritztma is a supervisor.

(Testimony of Edward Moss.)

Hearing Officer: All these things are certainly material as to whether or not he is a supervisor.

Q. (By Mr. Rissman): Does he own any stock in the corporation? A. No.

Q. How many other cutters do you have in San Fernando? A. We have two cutters.

Q. Who are they?

A. Jack Riztma and Joe Rindoni.

Q. How long has Joe Rindoni been employed by you? A. Over a year. [27]

Q. Do you have anyone else doing cutting or marking or spreading?

A. Spreading, I have two spreaders.

Q. Who are they?

A. John Heady and Ben Albert.

Q. How long have those two people been employed?

A. Well, I think John has been there about a year and the other one is a little less than a year.

Q. How long have John Heady and Ben Albert been doing spreading?

A. The past week or two.

Q. Prior to the past week or two, they were doing cutting work?

A. Oh, no; they were doing both.

Q. And Joe Rindoni was doing both, too?

A. Yes.

Q. In other words, until last week, Joe Rindoni, John Heady, and Ben Albert were doing cutting and spreading; is that correct?

A. I think in the last two weeks, yes.

(Testimony of Edward Moss.)

Q. You have recently, within the last week or so, laid off or fired a cutter?

A. I think it is a couple of weeks.

Mrs. Selvin: Mr. Hearing Officer, I object to that question; whether he was laid off or terminated has no materiality.

Mr. Rissman: It certainly has. The petition alleges there were four cutters. Now the witness tells us there are only two, [28] but when we probe a little bit, we find there are three, and I want to find out what happened to the fourth one.

Hearing Officer: I think the witness can answer the question.

The Witness: Who are you referring to?

Q. (By Mr. Rissman): You tell me who you fired in the last two weeks.

Mrs. Selvin: Mr. Hearing Officer, I object to the terminology, that he fired anybody.

Hearing Officer: The original question was whether somebody was fired or laid off. Now, I think this witness—state the name and also tell us how this person was terminated, if one of those terms fit, could say he was laid off or discharged or quit, or whatever happened.

The Witness: He was——

Q. (By Mr. Rissman): Who was it?

A. You know his name better than I do. I can't think of his name at the moment; what is his name?

Q. Aldo Baldwin; what happened to him?

A. He was laid off.

Q. When?

A. In the past couple of weeks.

(Testimony of Edward Moss.)

Q. Was he a cutter?

A. He was a spreader and a cutter.

Q. Spreader and cutter. In other words, Joe Rindoni, John [29] Heady, Ben Albert, and Aldo Baldwin are doing the same kind of work?

A. Yes.

Q. Now, prior to two weeks ago——

A. Well, pardon me; may I make an addition? Aldo Baldwin was only on a special job. He was doing just trims. He wasn't doing exactly what the other boys are doing.

Q. Now, John Heady and Ben Albert, for the past week or two have been confined only to spreading, is that right? A. Yes.

Q. Before that time, it is true, is it not, that Jack Ritzma did not do any production cutting, but merely was a pattern maker and designer?

A. Not true.

Q. How long has Jack Ritzma been doing the regular production cutting?

A. Well, off and on he has been cutting for the last few years, ever since he has been there. He was primarily, originally hired as a cutter, learned to make patterns and markers, so I primarily let him do that.

Then, when we need cutting, he does it; I mean, we don't have a fine line, a fine dividing line.

Q. How much time has he been spending on cutting in the last two weeks?

A. Not too much. [30]

About, I would say, at least, 35 per cent of his

(Testimony of Edward Moss.)

time, 20 per cent, I don't know. If he don't have any—his primary job is to make markers and patterns.

Q. How much time was he spending in the cutting when John Heady, Aldo Baldwin, and Ben Albert were employed as cutters?

A. About the same; he did all the samples, too, you know.

Q. Has there been a change in the dividing of your production in the last two weeks?

A. No.

Q. What is Joe Rindoni's method of pay, salary or hourly? A. Hourly.

Q. No piecework for cutters?

A. No; all hourly rate.

Q. What is Joe Rindoni's salary or hourly rate?

A. \$2.50 an hour.

Q. And how about John Heady?

A. 2.37½.

Q. And Ben Albert? A. \$2.37½.

Q. What was Aldo Baldwin's? A. \$2.50.

Q. Incidentally, while we are on cutters' salaries, how about Oscar Gallegos in Los Angeles?

A. \$3.00.

Q. And Helen O'Brien? [31] A. \$2.50.

Q. What other employees do you have at San Fernando, do you have operators? A. Right.

Q. Those are girls or men?

A. Primarily girls.

Q. They run sewing machines? A. Yes.

Q. And perform various sewing operations on

(Testimony of Edward Moss.)

the garments, is that correct?

A. Yes.

Q. How many are there?

A. Approximately?

Q. Approximately.

A. Are you going to break them down from sewing to buttonhole girl?

Q. I don't think so. In other words, it is true, is it not, that in the sewing operations you have collar makers, sleeve makers, buttonhole machine operators, girls who sew on buttons, others who may put on labels and various component parts?

A. Yes; they all use sewing machines.

Q. Over-all, how many sewing?

A. About 75.

Q. Who is in charge of the sewing machine operations?

A. Well, I. [32]

Q. You have over-all supervision, but do you have a forelady?

A. I have a forelady. Her name is Jessie Rising.

Q. R-i-s-i-n-g?

A. Yes.

Q. Keep this up, with a Jack Riztma, a Jessie Rising, we will run into a Rissman yet.

Now, are the sewing machine operators paid hourly wage or a piecework wage?

A. Some are hourly, some are piecework.

Q. What is the division of the 75, what portion would you say are piecework and what portion is hourly?

A. It varies. I can't make a definite statement. I don't know myself, but sometimes the girl starts on time work, and she works up to an operation, and

(Testimony of Edward Moss.)

goes on piecework. I would say there was 30 per cent time and 70 per cent—I am guessing.

Q. That is close enough. Normally, as a person becomes proficient in their job, they are put on a piecework basis?

A. Or if there is an opening?

Q. Yes. Now, Jessie Rising, what are her duties with respect to the operators?

A. She sees that they have work.

Q. What else?

A. If she has to train anybody, she does, any complaints—I don't know, all around the place.

Q. Does she have anything to do with hiring new girls or laying [33] girls off when they are not qualified?

A. They can't do that without my say so.

Q. In other words, she makes a recommendation?

A. Yes; she can make a recommendation.

Q. Is she paid a weekly salary or an hourly wage? A. Weekly.

Q. What is her—— A. \$85.00 a week.

Q. That is for a 40-hour week?

A. That's right.

Q. Incidentally, you told us before that one of the San Fernando cutters also drives a truck. Which one is he? A. Joe.

Q. Joe Rindoni? A. Yes.

* * *

Q. (By Mr. Rissman): Does Joe get extra com-

(Testimony of Edward Moss.)

compensation for driving the truck? A. Yes.

Q. How much? [34] A. \$15.00 a week.

Q. Now, is this truck driving of his done in addition to the 40 hours in the cutting department?

A. Yes.

Q. Does he live in Los Angeles?

A. Near Los Angeles.

Q. And—— A. On his way home.

Q. On his way home from San Fernando, he make deliveries from San Fernando to Los Angeles, picks up the load which he takes out the next morning when he goes to work; is that right?

A. Yes.

Q. What is it, a panel truck that he drives back and forth?

A. Yes. Of course, he gets free gas and the use of a car, all at the same time.

Q. You mean you don't charge him for the gas and the truck?

A. He don't have to pay for driving it from his house, in his own car.

Q. You say free gas, don't you mean you put gas in the car; you mean the gasoline used in driving the truck is paid for by the company?

A. That's right, but he is saved using his own car and saved gas—that is additional compensation.

Q. It is a fringe benefit?

A. Which we are happy to give him. [35]

Q. Does he have anyone with him in the truck or is he alone? A. He is alone.

(Testimony of Edward Moss.)

Q. How about the loading and unloading of the truck, does he do that?

A. If anybody is standing by, he helps.

Q. In addition to operators at San Fernando, do you have pressers? A. Yes.

Q. How many?

A. Do I have to answer that?

Hearing Officer: Yes, approximately.

The Witness: Five or six.

Q. (By Mr. Rissman): You have folders?

A. No.

Q. No folders? A. No.

Q. Do you do any operations at San Fernando beyond the pressing? A. No.

Q. After the shirts are manufactured in San Fernando and pressed, what happens to them?

A. They are sent down to Los Angeles.

Q. Now, the pressing that is done in San Fernando is not the finished pressing?

A. No. [36]

Q. That is the pressing which is necessary as part of the manufacturing operation, is that correct? A. Yes.

Q. So that the parts fit together properly and can be sewn together?

A. Under pressing?

Q. Under pressing, all right.

Do any of the four cutters that you have employed, that is, Joe Rindoni, John Heady, Ben Albert, or Aldo Baldwin, when he was working there, perform any operation in the sewing room?

(Testimony of Edward Moss.)

A. They didn't sew.

Q. Did they do any pressing? A. No.

Q. Did they do any——

A. They might have done some unloading; they didn't do any sewing.

Q. Didn't do any sewing? A. No.

Q. Did those four men ever do any work as part of their regular assignments outside of Joe Rindoni's truck driving in the Los Angeles operation?

A. No.

Q. Did Oscar Gallegos or Helen O'Brien, within the last three months, do any cutting in the San Fernando plant? [37] A. No.

Hearing Officer: Would you tell us, Mr. Moss, approximately how far apart these two plants are?

The Witness: 25 miles.

Hearing Officer: 25, all right.

Q. (By Mr. Rissman): Except for the truck which goes back and forth once a day, is there any other communication other than by telephone between the two plants?

A. Well, we send stuff out on the Greyhound Bus periodically, two or three or four times a week.

Q. It goes by Greyhound Bus, it goes from the Greyhound Bus Station here to the Greyhound Bus Station in San Fernando, it is not door to door?

A. That's right. We have piece goods for which we——

Q. But the only company-operated facility is this panel truck operated by the cutter, run by the cutter? A. We have no other trucks.

(Testimony of Edward Moss.)

Q. Do you have any other employees at San Fernando in addition to what you have told us?

A. Can you make that more specific?

Q. I am looking for information, for the record.

A. Well, I have in—you didn't mean trimming, and inspecting, and cleaning.

Mrs. Selvin: Bundling?

The Witness: Bundling, a few of the things that I can [38] think of.

Q. (By Mr. Rissman): What is trimming and who does it?

A. We have girls that trim the shirts.

Q. In other words, they cut the threads off?

A. Yes.

Q. Is that done by hand or by machine?

A. By hand.

Q. Do they use any handtools of any kind?

A. Scissors.

Q. Just the scissors? A. Yes.

Q. How many trimmers are there?

A. Well, it varies, approximately five, sometimes four and sometimes there is six.

Q. Under whose supervision do they work?

A. Mine.

Q. Everybody works under your supervision?

A. Yes.

Q. Who does the inspecting?

A. We have two girls or three, whatever is necessary.

Q. Where is the inspecting done?

A. San Fernando.

(Testimony of Edward Moss.)

Q. In what part of the plant?

A. The back end.

Q. Where is the cutting done in San [39] Fernando?
A. Alongside of a wall.

Q. Which wall?

A. I don't know. You know, it is the left-hand side as you come in.

Q. Well, north, south, east, or west?

A. I can't remember the direction there. I think it is north; you know, in San Fernando, it varies a lot. I would say it was north.

Q. North what? A. Northwest.

Q. The front part of the plant?

A. It is the front part, the front part is here and this is over here. (Indicating.)

Hearing Officer: Immediately after you come in the front way to the left?

The Witness: Yes.

Q. (By Mr. Rissman): Where is the trimming done with respect to the cutting?

A. It is—you come up along here on the left wall, and it is done back here near the back wall.

Q. Where is the inspecting done?

A. Same place.

Q. Same place as the trimming? A. Yes.

Hearing Officer: I take it, Mr. Moss, that this is one [40] large room, no partition in it at all?

The Witness: Just the office partition.

Hearing Officer: Just the office.

Q. (By Mr. Rissman): You mentioned cleaning, what is that?

(Testimony of Edward Moss.)

A. Well, I thought—sweeping up.

Q. Oh, janitor work? A. Yes.

Q. Do you have one or more janitors?

A. One; well, sometimes we have two.

Q. And Mrs. Selvin suggested bundling, how many bundlers? A. Five.

Q. Men or women? A. Women. [41]

* * *

Q. (By Hearing Officer): Mr. Moss, you said that the operation of the San Fernando plant ends with the making of the garments and their shipping them to Los Angeles, and I gathered the impression that there were further operations to be done on the garment before it was in shape to be sold? A. That is correct.

Q. Now, where do these garments go after they leave the San Fernando plant?

A. Los Angeles plant.

Q. And I take it, at that time, that all the sewing operations are complete, it is a completed garment? A. Yes.

Q. But it hasn't been finished, finished pressed?

A. That is right.

Q. From there, they are shipped to the Los Angeles plant? [52] A. Yes, sir.

Q. What happens to these garments at the Los Angeles plant?

A. Pressing, folding, boxing, shipped.

Q. Thank you.

Now, prior to the beginning of manufacture of

(Testimony of Edward Moss.)

the garment at the San Fernando plant, is there any preliminary work done that goes into the manufacture of that garment at the Los Angeles plant?

A. Of course, they are designed in Los Angeles, designing all takes place in Los Angeles.

Q. When a designer is finished with his work, what is it, what form?

A. Sometimes a drawing, sometimes a completed garment, sometimes a telephone conversation, but—where we have—you have styled so and so, change the collar, change the collar by putting another trim on it.

Q. All of this takes place in Los Angeles?

A. The primary designing, all the primary designing does.

Q. Is there any other operation in Los Angeles that takes place?

A. Sample making, cutting a sample, cutting of certain parts down there, the handling of goods that have to go on to other outfits, contractors, embroidery houses, painting houses, that also, but many a time we can cut a garment, send them down to Los Angeles; they in turn send it to the painter or [53] the embroider house or the completer.

Q. So, those would be special operations that you are not equipped to handle at the San Fernando plant; is that right?

A. Yes.

Q. Would that take place after the cutting is performed?

A. All those things are done after the cutting.

Q. But before any sewing?

(Testimony of Edward Moss.)

A. Before any sewing. Well, part of the sewing is done on other parts, the pleating and the cutting may be only the front.

Q. And that work is done by an outside contractor? A. Yes.

Q. And the Los Angeles plant, then, handles the contract arrangements?

A. Well, I arrange it all, but they handle the distributing of goods to the contractor. Many times after they are cut, we bundle them up and send them to the front, we send the fronts to Los Angeles and they in turn send it out. Sometimes they get goods in, don't come out of San Fernando.

Q. I see. Now, you mentioned that the Los Angeles plant does some sample making?

A. Yes.

Q. Are these samples used for selling to the trade on sales?

A. As well as given to me to go by.

Q. I see. They are also sent out to you as more or less as a pattern of production? [54]

A. So we can see all the parts.

Q. Is there any pattern making done in Los Angeles?

A. Yes; some original patterns; some originals are done there; some are done in San Fernando.

Q. What about the cutting that is performed in Los Angeles, do they perform any production cutting?

A. Yes. Well, when I say production, I should

(Testimony of Edward Moss.)

limit it to trim cutting, primarily, although they do some production cutting.

Q. By trim, do you mean collars and cuffs?

A. Collars and panels and other parts of the garment.

Q. I see, and those parts then would be shipped to San Fernando to be incorporated in the finished garment?

A. That's right. [55]

* * *

Cross-Examination

By Mrs. Selvin:

Q. Mr. Moss, you stated that the books of the company are kept in the Los Angeles office?

A. They are.

Q. Where is the payroll record kept for the San Fernando office?

A. In Los Angeles.

Q. In the Los Angeles office?

A. Yes.

Q. Where is the money deposited that comes in payment for the products you sell? [58]

A. Los Angeles.

Q. Is it a Los Angeles bank?

A. Yes.

Q. Does the San Fernando operation have a separate bank account?

A. No. [59]

* * *

Q. (By Mrs. Selvin): Would you describe the operation of spreading?

A. Spreading consists of receiving a chart on what to cut; a spreader then goes and gets the piece

(Testimony of Edward Moss.)

goods and lays it according to the chart. The chart tells him how many plys of each goods to put up.

Q. And this is the operation that is later checked with the bundlers? A. Yes.

Q. Before the cutter comes into the picture?

A. Yes. [69]

* * *

Q. (By Mrs. Selvin): In your testimony of questioning by Mr. Rissman, you described the operation of the Los Angeles plant and the San Fernando plant as an integrated plant?

A. It is true.

Q. And, by that, did you mean that part of the operation was [72] one place and part at the other, that they were integrated on the part analysis into one finished garment, finished garments that were sold? A. Yes.

* * *

Q. (By Mrs. Selvin): You testified that the plant in San Fernando had been in operation for about five years? A. Yes.

Q. Where was it located prior to that time?

A. Well, we have two plants in San Fernando, but on the same street. This is a new plant here. It is an enlarged plant from the one we had about six or eight months ago, but it was in San Fernando on the same street; but prior to that we were located in Los Angeles.

Q. You have just one plant in San Fernando at this time? A. Yes.

(Testimony of Edward Moss.)

Hearing Officer: Tell us approximately what the size of [73] the plant is.

The Witness: About 12,000 square feet. [74]

* * *

Redirect Examination

By Mr. Rissman:

* * *

Q. Who, if anyone, trains your cutters or do you hire only experienced cutters?

A. We assume they are experienced when they start to work. If they don't prove out, if they do badly, why, we feel they are inexperienced.

Q. Are you a cutter? A. No.

Q. Have you ever been?

A. I have spread and cut, but I wouldn't qualify myself to be a cutter.

Q. Why wouldn't you? [81]

A. Because I haven't made it my life's work.

Q. First let me ask you this: How long have you been in the shirt business?

A. The shirt business or in the clothing cut making?

Q. One at a time. A. Twenty-five years.

Q. In shirts? A. Shirts, about ten years.

Q. Is it about 15 years in addition to that in clothing?

A. Yes; in the clothing business, yes.

Q. Are you familiar with how long it takes to be a cutter, qualified?

(Testimony of Edward Moss.)

A. A qualified cutter?

Q. Yes.

A. Well, naturally it would depend on the man's ability. There is no training, length of training. If a man is apt, a good learner, he could become a cutter in three, four months.

Q. Have you ever trained any from scratch in three or four months?

A. I never trained any from scratch.

Q. Isn't it true that in order to become an all around qualified cutter to do spreading and marking and cutting, the type of man that you hire out there, it takes at least three or four years?

A. I don't think so. Let's say it takes a man—he has to [82] have experience. If you are referring to the ones we hire, I assume that they have had at least a year's experience, if that is what you are trying to bring out.

Q. Do you know how much experience any of your cutters have had before they came to work for you?

A. No.

Q. You told us before that it takes about a year to train a bundle girl, and you told us you can train a cutter in three or four months?

A. Well, I say to become—I assume that any that I hired would have had a year's experience prior to that, but a man could lay out and cut—

Q. In your opinion, does it take as much experience and training to become a bundle girl as it does to become a qualified cutter?

A. No.

Q. Have any of your cutters ever done any

(Testimony of Edward Moss.)

bundling, in your shop, as part of their regular routine work? A. No.

Q. Have any of the cutters been assigned to sit in the office and answer the phone, or whatever the girls do in the office?

A. Well, Jack answers the phone.

Q. Jack Riztma?

A. Yes; he can answer the phone. Also, Jessie could answer the phone or I could, or even, if it was lunch time and nobody [83] was around, anybody could answer it; nobody was assigned to answer it.

Q. During the working day when the cutters are at their cutting table and cutting or making spreads of cloth, do you ever send any of them to do any office work? A. No. [84]

* * *

GEORGE METALSKY

a witness called by and on behalf of the Petitioner, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rissman:

Q. Will you state your name, please?

A. George Metalsky.

Q. What is your business?

A. Business representative of Amalgamated Clothing Workers, Los Angeles Joint Board.

(Testimony of George Metalsky.)

Q. How long have you been a member of the Amalgamated Clothing Workers?

A. Since 1927.

Q. Prior to the time that you became business representative, were you engaged in any branch of the needle trade industry? A. I was.

Q. What is your occupation? A. Cutter.

Q. And how long were you a cutter?

A. From 1927 to 1948.

Q. Where were you employed as a cutter, what places?

A. New York City, 1927, at Cohen & Goldman, until 1948, until I came to California. [110]

Q. Mr. Metalsky, are you familiar with the time it takes for a person to become qualified to be a cutter? A. I am.

Q. What is that time?

A. An average person would take at least three years.

Q. Within the Los Angeles Joint Board of the Amalgamated Clothing Workers of America, is there a cutter's local? A. There is.

Q. What is the number of that local?

A. Local 369.

Q. Who is eligible to become a member of Local 369?

A. Anybody in the clothing industry that is a cutter.

Q. In other words, you limit your membership to persons engaged in cutting operations?

A. I do.

(Testimony of George Metalsky.)

Q. What does that include, just cutters or are there any other occupations which classify generally under the term "cutters"?

A. Markers, cutters and spreaders.

Q. You have heard the testimony this morning in this hearing, and the occupations described both by Mr. Baldwin and by Mr. Moss; from the basis of the testimony that you have heard, the following persons, are they eligible in the cutter's local, Joe Rindoni?

A. Yes, sir. [111]

Q. John Heady? A. Yes, sir.

Q. Ben Albert? A. Yes, sir.

Mrs. Selvin: Just a minute.

Q. (By Mr. Rissman): Would the girls who do the bundle work as described by Mr. Moss be eligible for membership in the cutter's local?

A. They would not.

Q. Does the petitioner in this case, the union, seek to represent in the present bargaining unit anyone other than the cutters and the spreaders?

A. Just the cutters and spreaders.

* * *

Received October 23, 1956.

Received in evidence April 29, 1957, as General Counsel's Exhibit No. 5-I. [112]

Before the National Labor Relations Board
Twenty-first Region

Case No. 21-CA-2657

In the Matter of:

MOSS AMBER MANUFACTURING COM-
PANY,

and

LOS ANGELES JOINT BOARD, AMALGA-
MATED CLOTHING WORKERS OF
AMERICA.

Monday, April 29, 1957

Pursuant to notice, the above-entitled matter
came on for hearing at 10:00 o'clock a.m.

Before: David F. Doyle, Trial Examiner.

Appearances:

GEORGE H. O'BRIEN,

Appearing on Behalf of the General Coun-
sel of the National Labor Relations
Board.

FRANK A. MOURITSEN, and
MRS. EDWIN SELVIN,

Appearing on Behalf of Moss Amber
Manufacturing Company.

WIRIN, RISSMAN & OKRAND, by
ROBERT R. RISSMAN, and
JEROME POSNER, and
GRISELDA KUHLMAN,

Appearing on Behalf of Los Angeles Joint
Board, Amalgamated Clothing Workers
of America.

* * *

Mr. O'Brien: Mr. Examiner, I shall ask the reporter to mark for identification the following documents:

As General Counsel's Exhibit 2, a copy of a letter dated February 12, 1957, addressed to Mr. Edward Moss, Moss Amber Corporation, and the original of which bore the signature of Jerome Posner, Manager of the Los Angeles Joint Board, the charging union;

As General Counsel's Exhibit 3, a copy of—

Mr. Mouritsen: Can we take a stipulation separately? We are willing to offer a stipulation as to Board's Exhibit 2 for identification, that it was sent by a man proposed to be Mr. Posner and received by Mr. Edward Moss.

Mr. Rissman: May the stipulation include the date of receipt by Mr. Moss?

Mr. O'Brien: I would assume there is no way we can tell within a day or so afterwards.

Mr. Rissman: Undoubtedly received the 13th, because the Answer is dated the 13th.

Mr. O'Brien: The correspondence consists of only three [13*] letters, and I suggest that they be

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

identified together and received under the same stipulation.

Trial Examiner: If that is satisfactory to you, gentlemen, the stipulation is accepted, and the documents are received in evidence.

Mr. O'Brien: Now, Mr. Examiner, No. 3 is a copy of a certified mail special delivery letter dated February 13, 1957, addressed to Jerome Posner, Amalgamated Clothing Workers of America, from Moss Amber, Inc., by Edward Moss. This letter acknowledges receipt of the letter of February 12, 1957.

As General Counsel's Exhibit 4, a copy of a letter dated February 15, 1957, addressed to Jerome Posner, bearing the signature of Mrs. Edwin Selvin, and by way of stipulation, I suggest that we agree that these copies contain the text in exchange of correspondence between the charging union and the respondent, and that each was received in due course shortly after the date it bears.

(Thereupon, the documents above referred to were marked General Counsel's Exhibits Nos. 2, 3 and 4 for identification.)

Mr. Mouritsen: So stipulated.

Trial Examiner: So stipulated.

Mr. O'Brien: Could I offer Exhibits 2, 3 and 4 in evidence?

Mr. Mouritsen: No objection.

Mr. Rissman: No objection. [14]

Mrs. Selvin: No objection.

Trial Examiner: The documents are received as General Counsel's 2, 3 and 4.

(The documents heretofore marked General Counsel's Exhibits Nos. 2, 3 and 4 for identification were received in evidence.) [15]

GENERAL COUNSEL'S EXHIBIT No. 2

Los Angeles Joint Board
Amalgamated Clothing Workers of America
2501 So. Hill Street, Los Angeles 7

(Copy)

February 12, 1957.

Certified Mail
Special Delivery

Mr. Edward Moss,
Moss Amber Corp.,
1825-1st Street,
San Fernando, California.

Dear Mr. Moss:

We have received the certification from the National Labor Relations Board authorizing us to represent the cutters.

I would appreciate it if you would let me know when we can arrange to meet within the next five days to discuss this matter.

Very truly yours,

JEROME POSNER,
Manager.

JP/mc

278 acwa

Received February 26, 1957.

Received in evidence April 29, 1957.

GENERAL COUNSEL'S EXHIBIT No. 4

February 15, 1957.

Via Registered Mail

Return Receipt Requested

Jerome Posner,

Manager, Los Angeles Joint Board, Amalgamated Clothing Workers of America, AFL-CIO,

2501 South Hill Street,

Los Angeles 7, California.

Re: 21-RC-4553

Moss-Amber Corporation

Dear Sir:

Your certified mail, special delivery letter, addressed to Mr. Edward Moss of Moss-Amber Corporation, has been forwarded to me for reply.

As you are aware, we made formal objection to the Board's ruling as to the appropriate bargaining unit of employees. We did not participate in the election, nor allow it to be held on company prem-

ises, nor did we post the notices of such election. Nor will we now recognize the certification issued as a result of the election held outside the company's plant.

This action is taken pursuant to Section 10 (f) of the National Labor Relations Act, which section provides the means by which our objections may be reviewed by a United States Circuit Court or by the United States Court of Appeals. When and if a "final Order of the Board" issues, after hearing of our refusal to bargain, it is our intention to invoke this right of a Court review of our objections.

In the meantime, you may consider this letter refusal to meet and discuss any terms of a contract.

Yours truly,

MRS. EDWIN SELVIN,

/s/ MRS. EDWIN SELVIN.

S/bn-cc Mr. Edward Moss.

Moss-Amber Corporation,
1825 First Street,
San Fernando, California.

Henry W. Becker,
Regional Director, National Labor Relations Board,
111 West Seventh Street,
Los Angeles 14, Calif.

Received February 18, 1957.

Received in evidence April 29, 1957.

* * *

Mr. Mouritsen: I will call Griselda Kuhlman as an adverse witness.

GRISELDA KUHLMAN

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Mouritsen:

Q. Miss Kuhlman, you signed the petition in the original representation hearing in this matter; is that correct? A. Yes; I did.

Mr. O'Brien: Objection. It is in the record. It is irrelevant and immaterial as far as these proceedings are concerned.

Trial Examiner: Well, I will overrule that objection, and take the answer. [25]

What was your answer, Miss Kuhlman?

The Witness: I did.

Q. (By Mr. Mouritsen): You also signed a complaint; is that correct? A. Yes, sir.

Mr. O'Brien: Objection.

Trial Examiner: I will overrule that, but I don't know where Mr. Mouritsen is going. I expect this is preliminary. Then I may rule on this.

Of course, you understand the basis of these objections, Mr. Mouritsen, that all of these things are matters of public record in this proceeding up to now, and this unfair labor practice proceeding in no way can become a retrial or another rehash of

(Testimony of Griselda Kuhlman.)

all the things which were brought out on the representation case.

I am saying that for your guidance.

Mr. Mouritsen: Do I understand, your Honor, that we are precluded from offering any testimony with reference to the appropriateness of the unit in this matter, or the identity and the activities of this organization in this proceeding, because we can save a lot of time, if your Honor will rule on that without having heard the——

Trial Examiner: When you say that you may not offer any evidence, I won't rule on it in that fashion. What evidence do you intend to prove? What evidence do you wish to adduce [26] here?

Mr. Mouritsen: I will develop that as I go along, your Honor. I think your Honor made a rather broad statement. Now, we can take your ruling and leave. However, I would suggest a more orderly proceeding as we go along and take it item by item.

Trial Examiner: Well, I gave you my general thinking on it because the ruling is very broad, and don't think for a moment that I will hesitate to give a broad ruling on this and in this proceeding in about five minutes, because as the case stands now, you have a proceeding which has been decided by the Board and the appropriateness of this unit.

Now, I don't know of any evidence that I might take which would show that the unit is inappropriate.

Now, if you will state your reasons why you think it is inappropriate, then I would pass on that, and

(Testimony of Griselda Kuhlman.)

if I see any relevancy, or see any way I could take it, well, perhaps I will take it.

Mr. Mouritsen: Well, shall we proceed and I will attempt——

Trial Examiner: I am asking you to put your cards on the table.

Mr. Mouritsen: Very well, your Honor. I object to this manner of proceeding as being prejudicial to my client. However, in conformity with your Honor's ruling, I will so [27] proceed.

Trial Examiner: All right, sir.

Mr. Mouritsen: I will propose to show, and I object in front of this and other witnesses who are adverse, and whom I will have to call, propose to show, your Honor, that the basis of the Board's decision as to the appropriateness of the unit, is based upon a number of mistakes in fact, and upon incomplete information. For example, in reading from Board's Exhibit 5-D, which is the Decision and Direction of Election, if the Examiner please, the paragraph at the top of Page 3 of that exhibit reads as follows:

“Upon the entire record herein, and particularly in view of the geographical separation of the two plants, their different functions, the”—I mean as to the first one, geographical, there is no dispute, their different functions. That, we propose to show is entirely erroneous and has no basis either in fact or in the transcript itself, and we propose to offer additional evidence with respect to that.

(Testimony of Griselda Kuhlman.)

The other fact upon which the Board relies in finding this unit:

“The lack of employee interchange and bargaining history.” The bargaining history very obviously is a makeway proposition since there has been no bargaining at all, and as to the lack of employee interchange, we propose to show evidence as to that. [28]

“And the fact that no labor organization currently seeks to represent employees at both plants.” We propose to offer evidence as to that, and to show that not only was this labor organization—and again I object to this disclosure prematurely, the fact that the labor organization here involved was attempting not only to organize other employees, the operators and bundlers, sewing machine operators, and all others, but those cutters at the Los Angeles plant as well.

Now, that is what we propose to offer and we propose to offer further to show that the employees whom they seek to organize, bundlers as well as cutters, are eligible for membership in this organization, or this bargaining agent, or whatever it is, and we propose to find out with respect to that that they are actively seeking to represent them, and that this attempt in effect is merely an attempt to carve out an unrealistic unit based upon the extent of organization. That is what we propose to do, and I submit, your Honor, by making this disclosure in front of these witnesses, our case is seriously handicapped.

(Testimony of Griselda Kuhlman.)

Trial Examiner: All right, I will give you a ruling on that now.

The situation, as I see it at this point, Mr. Mouritsen, is simply this: You have had a representation case and evidence was adduced and on the basis of that the Board came [29] to certain conclusions and issued a certificate to this labor organization. Now, if you claim that they are in error in that in any regard, in regard to that certification, when you take up this case on appeal, you will have a right to argue those things to the Board, but here, I proceed on the basis of this proceeding. Here before me now is a certification of this union. I can't take evidence which is behind the certification of the Board and make an independent judgment of my own, so I will give you a ruling now, that the matters which you propose to bring up in this proceeding are not relevant to the issues raised by this complaint in answer, and that they are properly things which should be and may be argued to the Board on appeal in accordance with the regulations and the Act.

I am not in a position, nor is it my function here, to give you a second representation proceeding, and I grant you an exception to my ruling.

Mr. Mouritsen: I understood we had an automatic exception.

Then, may I further proceed?

These have been shown to counsel. May they be given—may they be marked for identification?

Trial Examiner: Well, I think—just a second,

(Testimony of Griselda Kuhlman.)

to help the reporter here. Just to hand him a handful of those things, I don't think we can proceed in an orderly fashion that way. [30] You will have to give them some designation yourself, or some——

Mr. Mouritsen: I suggest he mark them Respondent's A, B, C, and then I would make an offer of proof and I'd identify them for the record.

Trial Examiner: All right, let's take a moment and he can mark them in accordance with your wishes, and you can offer them.

Mr. Mouritsen: Then I will ask this witness to remain so I can make an offer of proof with reference to her.

Trial Examiner: All right, we will take a few minutes while you mark those documents as requested by counsel.

(Thereupon, the documents above referred to were marked Respondent's Exhibits Nos. 1 through 6 for identification.)

Mr. Mouritsen: Now, I will make an offer of proof.

I am informed and believe, and, of course, you must realize my difficulty; this is an adverse witness. However, I expect she can testify——

Mr. Rissman: He has called her an adverse witness several times. I submit it is unjustified and note the fact that he has called this witness as his witness. He has asked her two questions which she has answered willingly and co-operatively. There is nothing in her attitude nor in her position which

(Testimony of Griselda Kuhlman.)

justifies a designation such as not even under the Federal Rules of Procedure.

Trial Examiner: All right, I will decide whether she is [31] adverse or not at the right time.

Q. (By Mr. Mouritsen): Well, let me ask you this: Have I ever talked with you, Miss Kuhlman?

A. No, sir.

Q. Have you ever seen me before or have I ever—well, I have never talked to you before; is that correct?

A. That is correct.

Mr. Mouritsen: I am informed and believe, therefore, submitting an offer of proof through this witness, that she is an organizer for the Los Angeles Joint Board, Amalgamated Clothing Workers of America, that that Joint Board, as I understand it, is made up of representatives of a number of local unions of Amalgamated Clothing Workers of America, that these comprise not only cutters but operators, locals, and probably pressers, and that I am not sure, but in any event represent various locals that comprise the entire employee classification in the garment industries so far as men's wear is concerned, that while they were that, she had signed the original petition which is part of this record as Board's Exhibit 5-A, and at the same time, both before and after this petition was signed, the Los Angeles Joint Board was attempting to organize employees at the same company, not only cutters but operators and all of the classifications in the employer's plant, both in Los Angeles and in San Fernando. I think that's about all on her. [32]

(Testimony of Griselda Kuhlman.)

Now, I would further propose as an offer of proof and in substantiation of the fact that organizational efforts were attempted among other employees at the same time they were attempting to organize the cutters, both in Los Angeles location, and in San Fernando.

I would offer Respondent's Exhibit No. 2 for identification, which is a card of Richard Webster, an organizer, which was passed on December 28, 1956, at the Los Angeles plant of the respondent herein.

I would further offer in evidence Respondent's 1 for identification, which is a dodger, or leaflet or— with a designation card attached thereto that was also passed out by this same organization, the petitioning union and the complaining union, at the Los Angeles plant, and that was passed out at or about the same time in 1956, namely, December.

I further offer as Respondent's Exhibit 3 for identification, which bears the notation 8/24/56, with the added testimony that this dodger was, with a card appended, or leaflet, as it may be called, passed out at the San Fernando plant of the respondent at or about the date it bears, and was passed not only to cutters but to operators and to all the other employees there employed, and it speaks for itself.

I would further offer Respondent's Exhibit 4 for identification, which bears date April 3, 1957, with the [33] further testimony that this dodger, handbill, or what-you-will, with an application card directed to Amalgamated Clothing Workers of Amer-

(Testimony of Griselda Kuhlman.)

ica, was passed out at the San Fernando plant, not only to cutters and operators, but other employees classifications.

I further offer as Respondent's Exhibit 5 for identification, a further leaflet, or handbill, that was dated April 18, 1957, with the further testimony that it, too, was passed out at the San Fernando plant of the respondent at or about the date it bears, and not only to cutters but to all other employees at the plant.

I would further offer in evidence Respondent's Exhibit 6 for identification, with the further testimony that it was received, sent and received by cutters at the San Fernando plant, and that this bears the signature of Ben Albert, the same one who was identified as a cutter in the prior proceeding and working at the San Fernando plant, apparently sent out by some organization called United Cutters Association. That is the same address as the charging union here, 2501 South Hill Street, Los Angeles, and some explanation should be made as to its identity; we feel it should be cleared up.

I would further state in my offer of proof, your Honor, that many of these matters that came into the case came at a comparatively late date, that not more than a week or so ago that many of these matters came to our attention after [34] the proceedings in the earlier case, and that were not available for testimony at that time to the knowledge of the representative who conducted the hearing.

(Testimony of Griselda Kuhlman.)

I would also offer, your Honor, in evidence—I would ask that these be marked——

Trial Examiner: Well, before we mark any more, let's dispose of those we have.

What is the purpose? What would these documents prove, and where are they relevant to this charge which states that this company did not bargain with a certified union?

Mr. Mouritsen: The basis of the charge, your Honor, as I understand it, is that there can be a refusal to bargain only upon—only where the union has been designated as the bargaining agent by a majority of the employees within an appropriate bargaining unit.

Trial Examiner: That has been decided by the Board in the representation proceeding and upon the basis of the election which was conducted, and all the proceedings up to the certification of this union beside the employees who are in this unit have designated as in. That is now *res adjudicata*, as far as I am concerned.

Mr. Mouritsen: Well, your Honor, I understood that we would be unable to get an appeal from that as it does not represent a final order of the Board from which an appeal can be taken. Therefore, the only way we could test that matter [35] would be upon application or revising the Board request for enforcement of an order.

I understand, however, your Honor, in a proceeding of this type that since it is based upon a finding, that it is a refusal to bargain within an

(Testimony of Griselda Kuhlman.)

appropriate unit, I do not understand, nor do I see that we are precluded from offering evidence which was not available at the time of the representation hearing, going for that very question, since it is a crux of the whole matter.

Trial Examiner: I will have a short statement from you, Mr. O'Brien. That is, what is your disposition with regard to these matters which counsel has brought up?

Mr. O'Brien: Well, I have several objections.

First of all, counsel for the respondent has characterized the witness on the stand as being adverse.

Trial Examiner: Well, that's the most minor part of this thing. How about these matters which counsel claims are relevant to this proceeding here, these documents which are now before me?

Mr. O'Brien: There is only one other preliminary matter here and that was the basis for my last remark, Mr. Examiner. That is that Mr. Mouritsen says he has not spoken to this witness and I have very serious doubts whether she would be competent to testify to the matters contained in Mr. Mouritsen's offer of proof. [36]

With that technicality out of the way, everything that Mr. Mouritsen has said relates to matters which either were presented to the Board in the representation case or could have been presented to the Board in the representation case, and it is a little bit late to offer that type of evidence here now.

My objection is to the receipt of any of these

(Testimony of Griselda Kuhlman.)

documents in evidence, and to consideration of Mr. Mouritsen's offer of proof based on the fact that it was irrelevant, immaterial, and will not tend to prove any of the issues in this proceeding.

Trial Examiner: That's my understanding of it, and I will not receive the documents in evidence, and your offer of proof is noted, and I will not accept the proof as outlined on the ground that these were all matters which were litigated or could have been litigated, or should have been litigated in the representation proceeding.

(The documents heretofore marked Respondent's Exhibits Nos. 1 through 6 for identification were rejected.)

Mr. Rissman: I would like to point out, in addition to what Mr. O'Brien has said, that at least two or three of the documents which Mr. Mouritsen referred and had marked for identification apparently came into existence subsequent to the issuance of the complaint in this unfair labor practice proceeding.

Mr. Mouritsen: I think I gave the date to everyone. [37]

Mr. Rissman: April 3, 1957, and April 18, 1957, were subsequent to April 1, 1957, the date of the issuance of the complaint. [38]

EDWARD MOSS

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Mouritsen:

Q. What is your full name?

A. Edward Moss.

Q. And where do you reside?

A. 4449 Cameilla, North Hollywood.

Q. And you are vice president of Moss Amber Manufacturing Company, the respondent herein?

A. I am.

Q. Did you testify in the earlier proceeding?

A. I did.

Q. Now——

Mr. Mouritsen: Mr. Examiner I would propose to go, with this witness, into the cutting functions that are performed at the Los Angeles plant and demonstrate those so the Examiner might know just what the earlier references in the testimony as to panel trim and so forth mean, and I will take the ruling and make an offer of proof. [40]

Trial Examiner: All right, I think you are up against the same situation on this point as you were before, Mr. Mouritsen. This matter—this is a matter which is properly included in the representation case, and is irrelevant and immaterial to this proceeding.

The decision of the appropriate unit is the Board's decision and has been made upon the evidence adduced there at the hearing in which everyone par-

(Testimony of Edward Moss.)

ticipated, and my only function here is to decide the issues raised by this complaint and answer, and that begins with reliance in this proceeding upon the certificates of the Board in the prior proceeding, so I can't see how evidence concerning the operations which the various employees perform would be relevant or material to this proceeding, nor how I could accept such evidence.

To do so, would in effect, be conducting a second representation hearing. So, my ruling is that this evidence which you offer—this proof which you offer is irrelevant and immaterial and it is rejected.

Mr. Mouritsen: Very well, I am informed, and believe I offered to prove with this witness that the cutting operations for the completed garments, that approximately 90 per cent of the garments that are shipped carry what is known as trim, that I would show through this witness that the trim that might be expected to be a very minor item [41] without being fully explained, as demonstrated here, is a large part of a garment. In other words, demonstrating with the brown shirt that this strip across the chest is what is known as trim. (Indicating.) As well as the collar on that garment, and that further that on this garment the collar and this insert is what is known as trim, a very substantial and integral part of the garment.

Further, that on a garment of this type that this is what is known as a panel, since it goes only to the side, and which comprises the major part of the front, that 90 per cent of the garments manufac-

(Testimony of Edward Moss.)

tured by the respondent, which 90 per cent of the garment bears.

Through this witness, we would show that the trim for the garments, completed garments, is cut at the Los Angeles plant, emphasizing that 90 per cent of the garment bears trim and then is transported as a part of the garment to the San Fernando plant where it is then incorporated into the completed garment and then is transported back to the Los Angeles plant after the trim has been incorporated in it for shipment and so forth, and that through inadvertence that fact or those facts, where not fully developed at the earlier hearing in the matter, that—

Trial Examiner: Have you finished with that feature?

Mr. Mouritsen: No, I am just thinking, if I may have a moment, your Honor. [42]

Trial Examiner: Well, while you are thinking, I might note on the record that counsel has produced three shirts here, three sport shirts, and his last remarks were directed to these particular shirts while he made some indication of the various parts of the shirts which he meant there appearing to be some different colored cloth, placed on different shirts—parts of the shirt, either on the shirt front or collar, which he indicated as trim.

* * *

Mr. Mouritsen: Further, I would offer to prove through this witness that the markers from which the trim is cut is first made in the San Fernando plant and transferred to the Los Angeles plant be-

(Testimony of Edward Moss.)

fore the trim is cut, that the patterns are made in the San Fernando plant and transferred to the Los Angeles plant as part of the cutting operation, and thirdly, that the materials are transported from the San Fernando plant to the Los Angeles plant and that all of these things, these markers, patterns, materials, are part of the cutting operation. [43]

I think that's all.

Trial Examiner: The proof is rejected on the same ground as I have specified before.

All these things are matters which are pertinent and proper to the representation proceeding.

* * *

Mr. Mouritsen: I would further offer to prove through this witness that the fact there has been no employee interchange in cutters is merely a happenstance, and there is nothing basically wrong or fundamentally opposed to interchanging employees, and that in truth and in fact Mr. Gallegos, one of the cutters, has occasionally done some interchanging, and there is no reason why there shouldn't be interchanging since they do the same type of work, and the only thing being that in the past it just hasn't happened; there's nothing to prevent it.

I think that completes my offer of proof, your Honor.

Trial Examiner: All right, that proof is also rejected under the same ruling as I gave you before on the same basis. [44]

* * *

Received May 7, 1957.

United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

MOSS AMBER MFG. CO.,

Respondent.

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—Series 6, as amended, hereby certifies that the documents set forth below constitute a full and accurate transcript of the entire record of proceedings had before the Board, entitled, “In the Matter of Moss Amber Corporation and Los Angeles Joint Board, Amalgamated Clothing Workers of America, AFL-CIO,” Case No. 21-RC-4553; and “In the Matter of Moss Amber Mfg. Co. and Los Angeles Joint Board, Amalgamated Clothing Workers of America, AFL-CIO,” Case No. 21-CA-2657, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceedings was entered, and including also the findings and order of the Board.

The documents attached hereto are as follows:

21-CA-2657

1. Stenographic transcript of testimony taken before Trial Examiner David F. Doyle on April 29, 1957, together with all exhibits introduced in evidence,¹ as well as rejected exhibits.

2. Copy of the Trial Examiner's Intermediate Report, dated May 21, 1957 (annexed to item 4 hereof).

3. Copy of Respondent's exceptions to Intermediate Report, recommended order and to various rulings of the Trial Examiner received June 13, 1957.

4. Copy of Decision and Order issued by the National Labor Relations Board on December 12, 1957, with Intermediate Report annexed.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the City of Washington, District of Columbia, this 26th day of April, 1958.

[Seal]

NATIONAL LABOR
RELATIONS BOARD,

/s/ FRANK M. KLEILER,
Executive Secretary.

¹This includes the stenographic transcript of testimony and exhibits in Case No. 21-RC-4553.

[Endorsed]: No. 15952. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Moss Amber Mfg. Co., Respondent. Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed March 31, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15952

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

MOSS AMBER MFG. CO.,

Respondent.

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR
RELATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondent, Moss Amber Mfg. Company, San Fernando, California, its officers, agents, successors, and assigns. The proceedings resulting in said Order are known upon the records of the Board as "In the Matter of Moss-Amber Corporation and Los Angeles Joint Board, Amalgamated Clothing Workers of America, AFL-CIO," Case No. 21-RC-4553; and "In the Matter of Moss Amber Mfg. Co. and Los Angeles Joint Board, Amalgamated Clothing Workers of America, AFL-CIO," Case No. 21-CA-2657.

In support of this petition the Board respectfully shows:

(1) Respondent is a California corporation engaged in business in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on December 12, 1957, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, agents, successors and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10(e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceedings before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein

and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent, its officers, agents, successors, and assigns, to comply therewith.

NATIONAL LABOR
RELATIONS BOARD,

/s/ THOMAS J. McDERMOTT,
Associate General Counsel.

Dated at Washington, D. C., this 26th day of April, 1958.

[Endorsed]: Filed March 27, 1958.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS

The National Labor Relations Board, petitioner herein, herewith submits the following statement of points pursuant to Rule 17 of this Court:

1. The Board acted within its discretion in determining the appropriate bargaining unit in this case.
2. The Board properly held that respondent's refusal to bargain with the certified union violated Section 8 (a) (5) and (1) of the Act.
3. The Board's procedure and order were valid and proper.

Respectfully submitted,

NATIONAL LABOR
RELATIONS BOARD,

/s/ THOMAS J. McDERMOTT,
Associate General Counsel.

Dated at Washington, D. C., this 26th day of
April, 1958.

[Endorsed]: Filed March 27, 1958.

[Title of Court of Appeals and Cause.]

RESPONDENT'S ANSWER TO PETITION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS
BOARD

Comes now Moss Amber Mfg. Co., Respondent herein, and in answer to Petitioner's Petition for Enforcement admits, denies and alleges:

1. Respondent admits the allegations contained in paragraph (1) of said Petition, except that Respondent denies that any unfair labor practices were committed by Respondent.

2. Respondent admits the allegations contained in paragraph (2) of said Petition, except that Respondent denies that it was afforded due process in said proceedings and on the contrary alleges that it was denied due process in said proceedings.

3. In further answer to said Petition, Respondent alleges that in the original representation proceedings which led to the determination of the appropriate bargaining unit, the Board was precluded from exercising an informed discretion by failure of the Petitioner therein to make disclosure of material and pertinent facts peculiarly within its knowledge.

4. Respondent denies that it was guilty of a refusal to bargain within the meaning of the Act.

5. Respondent denies that the Board's procedure in the unfair practice hearing was proper, and alleges in this connection that the failure to receive and consider evidence proffered by Respondent constitutes denial of due process to Respondent.

Wherefore, Respondent having fully answered the allegations contained in the Petition for Enforcement, respectfully requests that it be denied.

/s/ FRANK A. MOURITSEN,
Attorney for Respondent.

[Endorsed]: Filed April 16, 1958.



No. 15952

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MOSS AMBER MFG. Co., RESPONDENT

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JEROME D. FENTON,
General Counsel,

THOMAS J. McDERMOTT,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

FREDERICK D. REEL,
*Attorney,
National Labor Relations Board.*

FILED

OCT 20 1958

PAUL P. O'BRIEN, CLERK



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**In the United States Court of Appeals
for the Ninth Circuit**

No. ¹⁵⁷⁵²~~19152~~

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MOSS AMBER MFG. CO., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board, pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Sec. 151, *et seq.*)¹ for enforcement of its order issued on December 12, 1957. The Board's decision and order (R. 27-43) are reported at 119 NLRB No. 104; its decision and direction of election in the prior representation proceeding (R. 6-12) are reported at 116 NLRB 1998. This Court has jurisdiction, as the unfair labor practice (a refusal to bargain with the union certified by the Board) occurred at respondent's plant at San Fern-

¹ The pertinent statutory provisions are reprinted *infra*, pp. 15-16.

ando, California, where respondent manufactures men's sport shirts for shipment in interstate commerce (R. 52).

STATEMENT OF THE CASE

Briefly stated, respondent refused to bargain with the union certified by the Board as bargaining representative of the cutters and spreaders at respondent's San Fernando plant,² claiming that the Board acted arbitrarily and abused its discretion in finding that a unit limited to these employees was an appropriate bargaining unit. The facts giving rise to this issue may be summarized as follows:

A. The representation proceeding

On September 5, 1956, the Union filed a petition with the Board seeking certification as the bargaining representative of the cutters employed at respondent's San Fernando plant (R. 3-5).³ Respondent took the position that the appropriate unit should also include the two cutters employed at its Los Angeles plant, and the bundle girls and patternmaker at San Fernando (R. 7-8, 10-11). Subsequent to the Board decision in the representation proceeding, however, respondent in a motion for reconsideration expressly abandoned its contention with respect to the bundle

² Los Angeles Joint Board, Amalgamated Clothing Workers of America, AFL-CIO, herein called "the Union."

³ Although the petition was limited to "cutters", the facts show that the work originally done by cutters alone is now divided into work done by "cutters" and work done by "spreaders" (R. 4, 61-62, 65, 67, 85). All parties apparently agree that the cutters and spreaders are properly included in a single unit.

girls and patternmaker and expressly conceded that a unit confined to spreaders and cutters would be appropriate, although still contending that the Los Angeles cutters should be included in the unit (R. 20). At the hearing the following facts were established:

Respondent is engaged at San Fernando and at Los Angeles in the production of sports shirts (R. 53). The two plants are 25 miles apart, and there has been no interchange of employees between the two plants (R. 73, 24-25). The Los Angeles plant houses the Company's principal office and showroom, and books and payroll records are kept there (R. 53, 59, 79). In addition, the primary designing of the garments is done in the Los Angeles plant, which is also used for the production of samples (R. 54, 57, 77). After the designing is completed, the production of the garments is shifted to San Fernando, where the spreading, cutting, and sewing operations are performed (R. 54, 62-63, 68, 72). The finished goods are then returned to the Los Angeles plant where they are pressed, folded, boxed, and shipped (R. 57, 72, 76). Among the employees at the Los Angeles plant are two cutters in the design department, who cut samples and also cut "trim" (such as collars) which is then shipped to San Fernando to be incorporated in the finished garment (R. 55-56, 61, 78-79). All other cutting and spreading operations are performed at San Fernando (R. 78-79, 25).

The Company president, Henry Amber, is in general charge at Los Angeles, where he does the designing for the Company (R. 55, 57). The Company

vice-president, Edward Moss, is in general charge at San Fernando and spends 50 hours a week there, but testified that he also supervises the cutters at Los Angeles (R. 55, 56). The Los Angeles plant has approximately 25 employees; San Fernando employs approximately 100 (R. 55-59, 69, 74, 76, 65).

On the foregoing facts the Board found that a unit limited to the cutters and spreaders at the San Fernando plant was appropriate (R. 8-11). In excluding the Los Angeles employees the Board stated that it relied particularly on "the geographical separation of the two plants, their different functions, the lack of employee interchange and bargaining history, and the fact that no labor organization currently seeks to represent employees at both plants" (R. 9).

In accordance with the Board's decision, an election was held among the employees in the unit found appropriate, and a majority voted for the Union. The Board accordingly certified the Union as the bargaining representative of these employees. (R. 25-26.)

B. The unfair labor practice proceeding

Respondent, continuing to challenge the appropriateness of the bargaining unit determined by the Board, refused to bargain with the Union upon the later's request (R. 89-91). The Union promptly filed a charge with the Board, a complaint issued, and the case went to hearing before a Trial Examiner (R. 32-33, 86).

At the hearing counsel for the Company sought to introduce evidence that the Board had erred in determining that a unit confined to the San Fernando cutters and spreaders was appropriate (R. 94-95). In

particular, respondent sought to establish that both before and after the filing of the representation petition the Union was seeking to organize the other employees of the Company at both plants (R. 95, 98-100). Respondent also proposed to offer evidence to show that the Board erred in referring to the two plants as performing "different functions" (R. 94, 104-107). Counsel for respondent further stated that "as to the lack of employee interchange, we propose to show evidence as to that" (R. 95, 107). In support of his allegations, counsel for respondent offered in evidence several exhibits intended to show that the Union was actively attempting to organize respondent's employees at both plants, both before and after the hearing in the representation case, and after the issuance of the complaint in the unfair labor practice case (R. 98-100, 103). Respondent's counsel contended that this evidence would establish that the unit found by the Board was "an unrealistic unit based upon the extent of organization" (R. 95). Finally, respondent offered to prove through the testimony of Vice-President Edward Moss (who had been the principal witness in the representation case) that ninety percent of the finished merchandise includes "trim" cut in Los Angeles, that "trim" is often a substantial part of the garment, that the lack of employee interchange in cutters "is merely a happenstance," and that Mr. Gallegos, one of the Los Angeles cutters, "has occasionally done some interchanging" (R. 105-107).

The Trial Examiner declined to permit respondent to introduce the proffered testimony and exhibits, holding that the appropriateness of the unit had been

litigated in the representation proceedings, and that a single trial of the issue was sufficient (R. 103, 107). Accordingly, the Trial Examiner found that respondent's refusal to bargain with the Union certified by the Board violated Section 8 (a) (1) and (5) of the Act (R. 40).

The Board affirmed the rulings and conclusion of the Trial Examiner (R. 27-28). Respondent contended before the Board that some of the evidence it sought to adduce before the Trial Examiner was "newly discovered," and that such evidence, pertaining to alleged efforts by the Union to organize employees in addition to those included in the appropriate unit, would establish that such unit was inappropriate under Section 9 (c) (5) because it was based on the extent of the Union's organization. The Board held, however, that Section 9 (c) (5) precluded the Board only from giving controlling weight to extent of organization, that its unit determination was supported by other evidence wholly unrelated to extent of organization, and that the allegedly newly discovered evidence, even if admitted, would not affect the unit determination (R. 27-28, n. 1).

The Board accordingly ordered respondent to cease and desist from refusing to bargain with the Union, to bargain with the Union upon its request, and to post appropriate notices (R. 28-32).

ARGUMENT

The Board's unit determination was not arbitrary or capricious

Respondent, conceding that it refused to bargain with the Union certified by the Board, attacks the

validity of the certification, claiming that the unit determined by the Board was not appropriate. Under settled law the Board's unit determinations are binding unless they are in excess of the Board's statutory authority or are arbitrary and capricious. *Foreman & Clark, Inc. v. N. L. R. B.*, 215 F. 2d 396, 405-406 and cases cited in n. 7 (C. A. 9), certiorari denied, 348 U. S. 887. We show below that the Board's determination that the San Fernando cutters and spreaders constituted an appropriate unit was a reasonable exercise of the Board's statutory discretion and was not arbitrary or capricious.

A. The Board acted reasonably and not arbitrarily in confining the unit to cutters and spreaders

Insofar as the unit was confined to cutters and spreaders and excluded other employees, respondent itself is on record as conceding that such a unit is appropriate. In a motion for reconsideration filed with the Board, respondent, while urging that the Los Angeles cutter and spreader be included in the unit, stated that "The employer * * * agrees that if that is done the unit then so designated will in fact constitute an appropriate unit * * *" (R. 20). The Board in a series of cases has spelled out its reasons for holding that cutters and spreaders enjoy a community of interests different from those of other employees which justifies the inclusion of cutters and spreaders in a separate unit. *Little Champ Manufacturers, Inc.*, 104 NLRB 985, 990; *Rothschild-Kaufman Co.*, 98 NLRB 353; *Sir James, Inc.*, 97 NLRB 1572. These considerations, as well as respondent's express concession, establish that a unit confined to

cutters and spreaders is appropriate. Cf. *May Dept. Stores v. N. L. R. B.*, 326 U. S. 376, 379-380; *Mueller Brass Co. v. N. L. R. B.*, 180 F. 2d 402, 404-405 (C A. D. C.).

Respondent's "newly discovered evidence" that the Union was seeking to organize other employees in addition to cutters and spreaders does not render the unit inappropriate. The most that can be said for such evidence is that it shows some larger unit might also be appropriate, and that the Union (not the Board) was influenced by the extent of organization in seeking the smaller unit. Both of these contentions are laid to rest by this Court's decision in the *Foreman* case, *supra*, 215 F. 2d at 405-407; see also (as to larger unit) *Mueller Brass, supra*, 180 F. 2d at 405; *Harris Langenberg Hat Co. v. N. L. R. B.*, 216 F. 2d 146 (C. A. 8); and (as to "extent of organization") *Harris Langenberg, supra*, 216 F. 2d at 148-149; *Westinghouse Electric Corp. v. N. L. R. B.*, 236 F. 2d 939, 943 (C. A. 3); *N. L. R. B. v. Morganton Hosiery Co.*, 241 F. 2d 913 (C. A. 4).

B. The Board acted reasonably and not arbitrarily in confining the unit to cutters and spreaders at San Fernando, excluding those employed at Los Angeles

The Board carefully considered respondent's contention that the Los Angeles cutter and spreader should be included in the unit along with the San Fernando employees (R. 8-10). In rejecting this contention in the representation proceeding the Board stated that it relied "upon the entire record" and "particularly * * * the geographical separation of the two plants, their different functions, the lack of

employee interchange and bargaining history, and the fact that no labor organization currently seeks to represent employees at both plants * * * (R. 9).

The fact that the two plants are 25 miles apart is of itself a factor showing that the Board's determination is reasonable and not arbitrary. Indeed, among the units the Board is expressly authorized to find are a "plant unit, or subdivision thereof" (Section 9 (b), *infra*, p. 16). Respondent's contention here is substantially identical to that rejected by the Eighth Circuit in the *Harris Langenberg* case, *supra*, 216 F. 2d at 147-148. There, as here, the employer showed "an interchange of manufacturing operations between plants, but no substantial interchange of workers" and complained that "geographical considerations" alone did not justify limiting the bargaining unit to a single plant. The Court, however, sustained the Board's determination limiting the unit to a single plant. See also *N. L. R. B. v. Smith*, 209 F. 2d 905, 907 (C. A. 9); *N. L. R. B. v. Norfolk Southern Bus Corp*, 159 F. 2d 516, 519 (C. A. 4), certiorari denied, 330 U. S. 844; *N. L. R. B. v. Stanolind Oil Co.*, 208 F. 2d 239, 242 (C. A. 10).

In the above cited cases, to be sure, the Board found a "plant" unit to be appropriate, whereas in the instant case it limited the unit to the cutters and spreaders in the San Fernando plant. Under respondent's reasoning, however, even if the Board had found a plant-wide unit appropriate at San Fernando, the Los Angeles cutters and spreaders would have been wrongfully excluded. Such reasoning, we submit, is

fallacious in that it overlooks the fact that both the statute and the judicial authorities recognize that geographical considerations will justify exclusion from a bargaining unit.

The Board also adverted to the different functions of the two plants in excluding the Los Angeles people from the unit. In general terms, the San Fernando plant is devoted to actual manufacturing operations, and the Los Angeles plant is devoted to operations which precede or follow the manufacturing (R. 53-54, 57-58, 76-79). It is true, as the Company contends, that insofar as the Los Angeles cutters and spreaders cut "trim", which is sent to San Fernando for incorporation in the finished garment, they are engaging in a manufacturing operation. They are, however, also engaged in other activities such as cutting samples and making patterns, and were referred to by the Company vice-president (before the Board decision highlighting the significance of the separate function) as part of the "designing" department (R. 56-57, 61). Respondent has sought to explain their presence in Los Angeles rather than San Fernando as the result of space considerations. We respectfully submit that if these two employees were really an integral part of the San Fernando production operation, and not essential to different functions performed at Los Angeles, respondent would in all probability have found space for them in San Fernando to obviate the necessity of shipping "trim" between the two plants.

The lack of employee interchange between the two plants is a further consideration supporting the Board's determination. See *N. L. R. B. v. Smythe*,

212 F. 2d 664, 666 (C. A. 5); *N. L. R. B. v. Stanolind Oil & Gas Co.*, 208 F. 2d 239, 242 (C. A. 10); see also *N. L. R. B. v. Smith*, 209 F. 2d 905, 907 (C. A. 9.). Finally, the lack of bargaining history and the fact that no labor organization currently sought to represent the Los Angeles cutter and spreader were likewise appropriate for the Board to consider in excluding them from the unit. Cf. *May* case, *supra*, 326 U. S. at 379, 380.

Respondent contends that evidence which it sought to introduce in the unfair labor practice case (*supra*, pp. 4-5) would have established that the Board erred in its determination to exclude the Los Angeles employees. We turn, therefore, to a consideration of this proffered evidence to show, first, that it was properly excluded, and second, that its introduction would not have affected the result in this case.

C. The Board's procedure was valid and proper and did not prejudice respondent

The law is well settled that if an issue, such as the appropriateness of a unit, is litigated in a representation proceeding, the Board need not permit it to be relitigated in the unfair labor practice proceeding; "a single trial of the issue was enough." *Pittsburgh Plate Glass Co. v. N. L. R. B.*, 313 U. S. 146, 162; see also *N. L. R. B. v. American Steel Buck Corp.*, 227 F. 2d 927, 929 (C. A. 2); *N. L. R. B. v. Worcester Woolen Mills Corp.*, 170 F. 2d 13, 16 (C. A. 1), certiorari denied, 336 U. S. 903. Respondent contends, however, that the evidence it sought to introduce was not cumulative, but was newly discovered and ma-

terial to the issues and therefore not covered by the general rule quoted above.

Insofar as respondent's proffered evidence went to the functions and operations of the two plants, it was manifestly not "newly discovered." Thus, the evidence as to the number of finished garments which carried "trim" cut in Los Angeles was readily available at the time of the representation case, and was cumulative to evidence already in the record, and to the supplementary affidavit already filed by the same witness respondent sought to examine in the unfair labor practice case (R. 78-79, 22). Respondent also sought to introduce evidence that the lack of interchange of employees "is merely a happenstance" and that one of the employees "has occasionally done some interchanging" (R. 107). That the lack of interchange was "happenstance" would not alter the fact, relied on by the Board, that interchange had not occurred. The one employee, Gallegos, who is now alleged to have "interchanged," was specifically identified in the earlier proceeding as an employee who had never worked at San Fernando (R. 62, 107). An employer, once the Board has indicated reliance on such a factor in reaching a unit determination, should not be able by an occasional transfer of an employee, to upset a certification already issued and require relitigation of a representation proceeding. Moreover, the mere occasional interchange of employees would not affect the Board's reliance on the actual absence of free interchange of employees, as the cases cited on this point, pp. 10-11, *supra*, establish.

The only "newly discovered," non-cumulative evidence which respondent sought to introduce goes to the Union's efforts to organize other employees. The Board expressly passed on the effect of this evidence (R. 27-28, n. 1), thereby curing any error in excluding it. As we have previously observed (p. 8), the Union's efforts to organize other employees in no way affect the validity of the unit determination or suggest that the Board's determination was controlled by "extent of organization." The fact that the Union sought to organize the cutters and spreaders at Los Angeles is no more relevant than the fact that the Union sought to organize other employees at San Fernando. Indeed, assuming that the Union succeeded in these efforts, there is no reason to suppose that either the Union or the Board would expand the bargaining unit; the newly organized employees might well be in a different bargaining unit. Respondent would apparently have it that, once a union was chosen to represent a part of a plant, the union must cease all efforts to organize other employees, on pain of losing its certification. Nothing in the statute suggests that any such restriction should be imposed. Insofar as respondent seeks to show that the Union sought to organize the Los Angeles cutter and spreader *before* the certification issued, this fact was put before the Board in the prior proceeding (R. 24). The Board's statement that "no labor organization currently seeks to represent employees at both plants" (R. 9) refers to the fact that no union had filed a petition with the Board claiming to represent employees at both plants; the Board is not concerned,

and is certainly not "controlled" by organizing efforts which have not reached the stage of a formal representation claim.

CONCLUSION

In sum, we believe that this case is largely controlled by this Court's decision in the *Foreman* case, *supra*, 215 F. 2d at 405-408, sections 4-7 of the opinion. For the reasons there stated, as well as for those set forth in this brief, we respectfully submit that a decree should be entered enforcing the order of the Board.

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National Labor Relations Board.

OCTOBER 1958.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit

appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof:

(c) (5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

No. 15952

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

MOSS AMBER MFG. Co.,

Respondent.

On Petition for Enforcement of an Order of the
National Labor Relations Board.

RESPONDENT'S BRIEF.

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FILED

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On Petition for Enforcement of an Order of the
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RESPONDENT'S BRIEF.

Statement of the Case.

The Statement of the Case contained in the Board's Brief fails to set forth two facts which Respondent regards as important.

(1) In making its determination of the appropriate bargaining unit in the representation case the Board did not consider as a factor the extent of organization among the employees of Respondent at the San Fernando plant. [R. 6-12.]

(2) At the hearing before the Trial Examiner in the unfair labor practice case, Respondent did urge that the evidence regarding efforts of the Union to organize all production employees, not only cutters, at the Los Angeles

and San Fernando plants, both before and after the filing of the petition and the hearing in the representation case was “newly discovered” and was not available to Respondent at the time of the representation hearing. [R. 100, 102.] The Trial Examiner made no specific ruling upon the fact that the evidence was “newly discovered,” nor did he inquire as to why the Respondent did not discover such evidence before the representation hearing. He merely rejected all evidence proffered upon the ground “that these were all matters which were litigated or could have been litigated, or should have been litigated in the representation proceeding.” [R. 103.] In its exception to the report of the Trial Examiner filed with the Board, Respondent urged that it was error for the Trial Examiner to exclude this “newly discovered” evidence. [R. 45-50.]

The Evidence Excluded and the Grounds for Such Exclusion.

On September 5, 1956 the Union filed its petition with the Board seeking certification of the cutters employed at Respondent's San Fernando plant. [R. 3-5.] There were three cutters so employed—all males. [R. 85.] There were approximately 100 other production employees at the same plant, most of whom were females. [R. 69, 74, 76.]

The Respondent offered evidence that in August, 1956 [R. 99; Resp. Ex. 3 *id.*] before it filed its petition for 3 employees, the Union was attempting to organize all production employees at the San Fernando plant [R. 99]; that all such employees were eligible for membership in the Union [R. 95, 98], and that this evidence was not available nor known to the Respondent at the time of the hearing on the representation matter. [R. 100, 102.]

Counsel for the General Counsel objected to the receipt of such evidence upon the grounds that it related to matters which either were or could have been presented in the representation case, and further that such evidence was irrelevant, immaterial and would not tend to prove any of the issues. [R. 102-103.] The Trial Examiner sustained the objection to the receipt of such evidence upon the ground that "these were all matters which were litigated or could have been litigated, or should have been litigated in the representation proceeding."

ARGUMENT.

The Limitations on the Board's Discretion in Determining the Appropriate Unit.

The Union is entitled under the Act to bargaining rights only when it has demonstrated that it represents a majority of the employees in an appropriate bargaining unit. To apply that principle to the facts of this case—if the appropriate unit in this case consists only of cutters, then the Union has only to demonstrate that it represents 2 employees, whereas if the appropriate unit is found to be all production employees, the Union must demonstrate that it represents 51 employees in order to be entitled to bargaining rights. Thus, it is clear that in any claimed refusal to bargain under the Act, the determination of the appropriate bargaining unit is of paramount importance.

The National Labor Relations Board is the agency designated to determine the appropriate bargaining unit. Prior to 1947 the Board enjoyed practically unlimited discretion in determining what constitutes an appropriate unit. In some cases the determination was based upon the extent to which the employees had organized, the

result being that the union involved became entitled to bargaining rights for a small part of the employees, or for a department of a plant, instead of the entire plant. This Congress found to be undesirable. In 1947 it placed a limitation upon the discretion of the Board in this regard, amended the Act by adding Section 9(c)(5) (set out in Appendix to Board's Br. p. 16) which specifies that the extent to which the employees have organized shall not be controlling in the determination of the appropriate unit. The reasons advanced by the House of Representatives for adopting the amendment are as follows:

“Section 9(f)(3)¹ strikes at a practice of the Board by which it has set up as units appropriate for bargaining whatever group or groups the petitioning union has organized at the time. Sometimes, but not always, the Board pretends to find reasons other than the extent to which the employees have organized as ground for holding such units to be appropriate (*Matter of New England Spun Silk Co.*, 11 N. L. R. B. 852 (1939); *Matter of Botany Worsted Mills*, 27 N. L. R. B. 687 (1940). While the Board may take into consideration the extent to which employees have organized, this evidence should have little weight, and, as section 9 (f)(3) provides, is not to be controlling.

“The act still leaves the new Board wide discretion in setting up bargaining units.” (House Report, 245, 80th Cong., pp. 37-38.)

¹Section 9(c)(5) derives from the House bill, where it was included as Section 9(f)(3).

The Limitation Upon the Board's Discretion Relative to the Appropriate Unit Was Disregarded in the Present Case.

It is Respondent's contention that in this case the Congressional limitation upon the Board's discretion was disregarded and a unit found to be appropriate in which the controlling factor was the extent to which the employees had organized. The Union filed a petition for a unit containing 3 employees at the same time when it was attempting to organize the other 97 in the same plant. The Union certainly knew of its own organizing efforts, the Respondent did not. The Board is charged with the duty of investigating any claim that a question of representation exists,² and its investigation should have revealed the above facts. A representation hearing is not an adversary proceeding but merely part of the Board's investigation.³ Why would a Union which takes as members all employees in a plant merely ask to represent 3, instead of 100, if it was not proceeding on the extent to which it had organized the employees. The Board, expert body that it is, cannot close its eyes to these facts. If the Union failed to disclose its efforts to organize all employees, that still does not excuse the Board from making a thorough investigation. If the Union follows its present procedure we can expect the filing of separate petitions for any other group which it happens to have organized, with a resultant disregard of the Congressional intent to prevent piece-meal organization of an employer such as Respondent, and added inconvenience, expense and duplication of effort by employer and Board.

²See Appendix.

³*Southern S. S. Co. v. NLRB*, 120 F. 2d 505.

The Exclusion of the Proffered Evidence Constitutes Prejudicial Error.

The General Counsel's objection that the excluded evidence proffered by Respondent was not material to the issue of the appropriate unit is not well taken. One of the factors which the Board considered in some of the cases decided prior to the adoption of Section 9(c)(5) in determining the appropriate unit was the Union's efforts to organize other employees of the same employer. (*Vickers, Inc.*, 60 N. L. R. B. 969; *Charles H. Bacon & Co.*, 53 N. L. R. B. 296.)

Since evidence of the Union's organizing efforts among employees other than cutters was not known to the Respondent at the time of the representation hearing the Respondent could not have introduced it at that time. The Trial Examiner did not specifically rule upon the fact that the evidence being excluded was newly discovered. His was a sweeping ruling which treated evidence which was known to the Respondent at the time of the representation hearing the same as the newly discovered evidence. In support of his ruling he cited several cases [R. 38] none of which is authority for the ruling that newly discovered evidence may not be considered under appropriate circumstances. In *Allis-Chalmers Mfg. v. N. L. R. B.*, 162 F. 2d 435, one of the cases so cited the court said in upholding the exclusion of certain testimony: "There was no claim that the testimony thus proposed to be introduced was newly discovered testimony not available or known to petitioner at the time of the representation hearing," and in *Pittsburgh Plate Glass Co. v. N. L. R. B.*, 313 U. S. 146, the following appears:

"With respect to item (3), the distinct interests of the Crystal City employees, the Board ruled that in

the unit proceeding the Company and the Crystal City Union were given full opportunity to present such evidence, *and in the present proceeding neither of them had indicated that the proof sought to be admitted related to evidence unavailable at, discovered since, or not introduced in, the unit hearing.*

* * * * *

“If the Company or the Crystal City Union desired to relitigate this issue, it was up to them to indicate in some way that the evidence they wished to offer was more than cumulative. *Nothing more appearing,* a single trial of the issue was enough.” (Emphasis added.)

Respondent did make the claim that the evidence was newly discovered. [R. 100, 102.]

The characterization of the proffer of such evidence as an attempt to relitigate an issue appears to be of questionable accuracy in view of the non-adversary character of representation proceedings.

The customary inquiry made by a court in considering whether newly discovered evidence should be received is whether the one offering it failed to exercise reasonable diligence in not presenting such evidence on an earlier occasion. The General Counsel did not contend that the Respondent had not exercised reasonable diligence in this regard, and the Trial Examiner did not base his ruling thereon, nor did he make any inquiry in regard thereto. The reason is obvious. Any questioning by Respondent of its employees concerning their organizing activities, or surveillance of such activities would be in violation of the Act. Diligence on Respondent's part in this regard would have only led to the filing of other charges of unfair labor practices. On the other hand the Union was

well aware of its organizing efforts among Respondent's employees, other than cutters and such efforts should have been uncovered by the Board in its investigation. As pointed out above such evidence is material to the determination of the appropriate unit, particularly in view of the noted limitation on the Board's discretion. The reason why such organizing efforts by the Union was not considered at the earlier hearing was due to the Union's failure to make disclosure of such facts and the Board's, not the Respondent's lack of diligence in discovering it.

In its decision the Board neither upheld nor overruled the Trial Examiner in his exclusion of the evidence relative to the organizing efforts of the Union. [R. 27-28.] It held that the exclusion, even if erroneous, was not prejudicial because its determination of the unit was supported by clear and decisive evidence wholly unrelated to extent of organization. That evidence it summarized in its decision in the representation case as follows:

"Upon the entire record herein, and particularly in view of the geographical separation of the 2 plants their different functions, the lack of employee interchange and bargaining history, and the fact that no labor organization currently seeks to represent employees at both plants, we find that a unit of employees limited to the San Fernando plant is appropriate." [R. 9.]

It is respectfully submitted that such findings when viewed against the background of the Union's organizing efforts among other than cutters at the San Fernando plant are wholly unrelated to the true and existing situation.

In view of the foregoing Respondent contends that it was prejudicial error for the Trial Examiner and the

Board to exclude the evidence described above. Such evidence was material to the issue of the appropriate unit under the Board's own decisions. The Respondent was not guilty of lack of diligence in discovering such evidence—the fault lying with the Union and the Board itself. The failure to consider such evidence results in a decision which is contrary to the provisions of the Act, and the exclusion thereof is a denial of due process to the Respondent.

Conclusion.

The Board has failed to show that the Respondent was guilty of a refusal to bargain within the meaning of the Act, or of any other violation of the Act, and it is therefore respectfully submitted that the petition for enforcement should be denied.

FRANK A. MOURITSEN,

Attorney for Respondent.







No. 15953

**United States
Court of Appeals**
for the Ninth Circuit

CARLIN CONSTANTINE VENUS,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

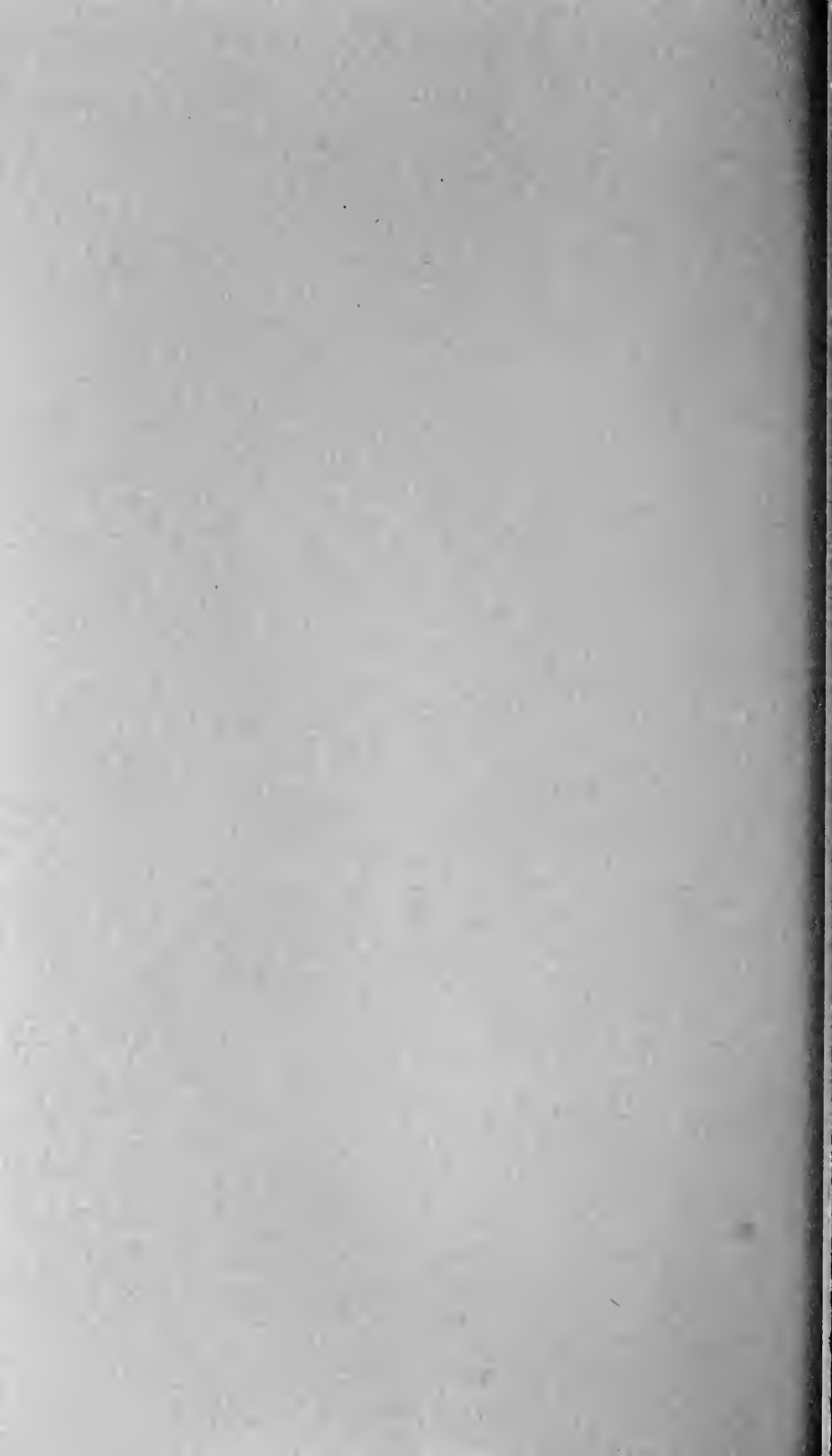
Transcript of Record

**Appeal from the United States District Court for the
Southern District of California
Southern Division.**

FILED

MAY 22 1958

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No. 15953

**United States
Court of Appeals**
for the Ninth Circuit

CARLIN CONSTANTINE VENUS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California
Southern Division.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Lemon Grove, California;

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Brooklyn 1, New York.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;

JOHN K. DUNCAN,
Assistant U. S. Attorney,
U. S. Customs & Courthouse Building,
San Diego 1, California.

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In the United States District Court in and for the
Southern District of California, Southern Division

No. 26877-SD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CARLIN CONSTANTINE VENUS,

Defendant.

July, 1957, Grand Jury—Southern Division

INDICTMENT

(U.S.C., Title 50, App., Sec. 462-(a); Universal
Military Training and Service Act.)

The Grand Jury charges:

Defendant Carlin Constantine Venus, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 140, said board being then and there duly created and acting, under the Selective Service System established by said act, in San Diego County, California, in the Southern Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class 1-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on

November 8, 1955, in San Diego County, California, in the division and district aforesaid; and [2*] at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and neglected to report for induction into the armed forces of the United States as so notified and ordered to do.

A True Bill.

/s/ CHARLES G. ARNOLD,
Foreman.

/s/ LAUGHLIN E. WATERS,
United States Attorney.

[Endorsed]: Filed August 8, 1957. [3]

[Title of District Court and Cause.]

GOVERNMENT'S REQUESTED INSTRUCTIONS TO THE JURY

Instruction No. 1

The Indictment charges that defendant Carlin Constantine Venus, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 140, said board being then and

*Page numbering appearing at foot of page of original Certified Transcript of Record.

there duly created and acting, under the Selective Service System established by said act, in San Diego County, California, in the Southern Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class 1-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on November 8, 1955, in San Diego County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and neglected to report for induction into the armed forces of the United States as so notified and ordered to do. [5]

Instruction No. 2

The Indictment in this case is brought under the Universal Military Training and Service Act, which provides in pertinent part as follows:

“Any person who * * * knowingly * * * evades or refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required by him under this (Universal Military Training and Service Act) or rules or regulations * * * made pursuant to this (Universal Military Training and Service Act) * * * shall * * * be punished,” as provided by law. [6]

Instruction No. 3

The Universal Military Training and Service Act, portions of which I have previously read to you, was passed by the Congress of the United States pursuant to authority given to the Congress by the Constitution to provide for the defense of the nation. You are not here concerned with the wisdom or unwisdom of this statute. It is the duly promulgated law of the land and you must be governed by its mandate in the consideration of the evidence and in the determination of this case.

To better understand this law, I shall summarize some of its provisions for you.

The law provides that it shall be the duty of every male citizen of the United States who is between the ages of 18 and 26, on the day or days fixed for registration, to present himself or submit himself to registration.

The President is authorized to select and induct into the armed forces of the United States for training and service those registrants who have been selected in an impartial manner under such rules and regulations as the President may prescribe.

The Act further authorizes the President to prescribe the necessary rules and regulations to carry out the provisions of the Act, and to establish Selective Service civilian boards, including local boards and appeal boards. The local boards, under the terms of the Act, have power to hear and determine all questions or claims with respect to induc-

tion in or exemption or deferment from training and service, and the decisions of such local boards are final, except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe.

If any registrant is dissatisfied with his classification by his local board, or if his claim for exemption from service is denied by such local board, he then may appeal to his appropriate [7] appeal board within a fixed time prescribed by the Selective Service Regulations and may appeal from each new classification or reclassification by the appeal board.

You are not here sitting as a court of appeal to determine whether the local board was correct in its determination of the classification of the defendant. The local board's action is final and you are bound to accept the classification given to the defendant. You are to determine from the action of the local board and all the other evidence in the case whether there was a refusal on the part of the defendant to do what the law required, viz., to report for induction into the military service pursuant to the lawful order of the local board, and whether, if you find beyond a reasonable doubt that there was such a refusal, the defendant did so refuse knowingly. [8]

Instruction No. 3-A

You are instructed that the classification 1-A means that a registrant is available for military service.

(32 C.F.R. 1622.2) [9]

Instruction No. 4

You are instructed that in order to find the defendant guilty as charged in the Indictment, you must find that:

(1) The defendant on or about November 8, 1955, was a registrant of Local Board No. 140 in San Diego County, California.

(2) That at such time in such place, the defendant was classified in Class 1-A by said Board.

(3) That the defendant was ordered by said Board to report for induction into the armed forces of the United States on November 8, 1955, in San Diego County, California.

(4) That the defendant did on such date, and at all times thereafter, knowingly fail to report for induction. [10]

Instruction No. 5

The word "knowingly" as used in the Indictment can be taken only as meaning deliberately and with knowledge and not something which is merely careless or negligent or inadvertent.

(*Browder v. United States*—
312 U.S. 335 (p. 341)) [11]

Instruction No. 6

Evidence has been offered by the defendant to the effect that he never received the Order to Report

for Induction. You are instructed that the Selective Service Regulations which are passed pursuant to law provide that “* * * the mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not.”

(32 C.F.R. 1641.3) [12]

Instruction No. 7

You will note that the Indictment charges the defendant failed to report for induction into the armed forces of the United States on November 8, 1955.

The Selective Service Regulations which are passed pursuant to law provide that “When it becomes the duty of a registrant * * * to perform an act * * * the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act * * * shall in no way operate as a waiver of that continuing duty.”

In this connection, if you find that the defendant knowingly failed to report for induction at any time between November 8, 1955, and August 8, 1957, the date of the return of the Indictment, you may find him guilty of the offense as charged.

(32 C.F.R. 1642.2)

(Silverman v. U.S.

220 F 2 36 CA 8 (1955))

LAUGHLIN E. WATERS,

United States Attorney;

/s/ JOHN K. DUNCAN,

Assistant U. S. Attorney.

[Endorsed]: Filed November 14, 1957. [13]

[Title of District Court and Cause.]

JURY INSTRUCTIONS

Comes now the defendant, Carlin Constantine Venus, and respectfully submits the attached Jury Instructions and requests that the Court give the same. [14]

Defendant's No. 12

Before there arises a presumption of fact that the addressee of a letter has received it, it must first be proved that it was properly addressed, but no such presumption arises unless it appears that the person to whom sent resided at the place to which it was mailed.

Kansas City Life Ins. Co. v. Cox,

104 F 2d 321

Leahy v. U. S.,

15 F 2d 949 [27]

Defendant's No. 13

The presumption of receipt from mailing cannot be based upon the presumption, unsupported by direct evidence, that a public officer performed his or her duty in mailing a notice.

Gregory v. Kirkman Consol. Indep. School
Dist.,

186 Iowa 914, 173 N.W. 243 [28]

Defendant's No. 14

Where the fact of notice is made by statute to rest on the presumption that a letter mailed was received, there must be clear proof of the mailing.

U. S. v. Rice,
281 F 326 [29]

Defendant's No. 15

To establish mailing of a letter containing a notice, in the absence of direct evidence, there must be proof of an invariable custom or usage in an office of depositing mail in a certain receptacle, that the letter in question was deposited in such receptacle and, in addition, there must be testimony of the employee whose duty it was to deposit the mail in the post office that he or she either actually deposited that mail in the post office or that it was his or her invariable custom to deposit every letter in the usual receptacle.

U. S. v. Rice,
281 F. 326 [30]

Defendant's No. 16

Where a party has abandoned the address to which a letter was addressed prior to sending, no presumption of receipt arises from posting.

General Acc. Fire & Life Assur. Corp. v.
Pacific Coast Casualty Co.,
247 F. 416, 159 CCA 470 [31]

Defendant's No. 17

There is a presumption that a letter or postal card properly addressed, stamped and duly mailed by the addressor was received by the addressee in the due course of mail. [32]

Defendant's No. 18

If you should find that the defendant has not been given due notice to report for induction pursuant to the Selective Service Regulations, then you are bound to find that the defendant did not have a continuing duty to report. [33]

Defendant's No. 19

The defendant is being charged with failure to report for induction on November 8, 1955, in San Diego County, California, and any evidence concerning his failure to report after said date shall be disregarded by you in determining whether or not the defendant has performed the acts required of him under the Universal Military Training and Service Act. [34]

Defendant's No. 20

The defendant is being charged with failure to report for induction and not for failure to submit to induction, and therefore any evidence bearing on the question of whether or not defendant intended to submit to induction is to be disregarded in determining whether or not the defendant had any criminal intent on the charge of failure to report. [26]

Defendant's No. 21

If you should find that an order to report for induction was not mailed to the defendant's last known address, then you must return a verdict of not guilty. [35]

Defendant's No. 22

If you should find that no due notice to report for induction was given to the defendant, then a verdict of not guilty must be returned. [36]

Defendant's No. 23

You shall not consider the defendant's failure to report after November 8, 1955, as an offense since anything he did after that date has no bearing on the question of whether or not he failed to report on November 8, 1955. The defendant cannot have a continuing obligation to report if you find that he never received an order to report. The only time the defendant would have a continuing obligation to report would be if he had received an order to

report. The defendant would have to be charged specifically with a failure to observe this continuing duty to report. The indictment in this case does not so charge the defendant. [37]

Defendant's No. 24

You are entitled to take into consideration both the prior actions and the subsequent actions of the defendant in determining whether or not he, in good faith, attempted to comply with the Selective Service Regulations and the Universal Military Training and Service Act. [38]

Defendant's No. 25

If you should find that the defendant contacted his Local Board upon learning that he had been reported delinquent, and said Board, through its agents or employees, informed the defendant that there was nothing that they could do, but that the matter was up to the United States Attorney's Office, then you should find that the plaintiff has waived its rights in requiring the defendant to make any further report.

/s/ KENNETH A. BARWICK

[Endorsed]: Filed November 14, 1957. [39]

[Title of District Court and Cause.]

MINUTES OF THE COURT
NOVEMBER 14, 1957

Present: Hon. Jacob Weinberger, District Judge;
U. S. Atty., by Assistant U. S. Atty. John
K. Duncan. Counsel for the Defendant:
Kenneth Barwick.

Defendant is present on bond.

Proceedings: Further Jury Trial.

Both sides answer ready, It Is Ordered that this
trial proceed.

William McManis is called, sworn and testifies
for the Defense.

Both sides rest.

The Jury is excused at 10 a.m. and in the absence
of the jury Attorney Barwick moves for judgment
of acquittal. Later, It Is Ordered motion denied.

At 2:27 p.m. Counsel argue to the Jury.

At 3:27 p.m. the Jury is excused until November
15, 1957, at 9:45 a.m. for further proceedings, and
court and counsel in the absence of the jury discuss
legal matters and later recess.

JOHN A. CHILDRESS,
Clerk;

/s/ E. M. ENSTROM, JR.,
Deputy. [41]

[Title of District Court and Cause.]

VERDICT

We, the jury in the above-entitled cause, find the defendant, Carlin Constantine Venus, Guilty as charged in the Indictment.

/s/ JAMES R. LEWIS,
Foreman of the Jury.

Dated: November 15, 1957, San Diego, California.

[Endorsed]: Filed November 15, 1957. [40]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The defendant moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.
2. The verdict is contrary to the weight of the evidence.
3. The verdict is not supported by substantial evidence.
4. The Court erred in admitting testimony of the witness Helen A. Haisch to which objections were made.

5. The Court erred in charging the jury and in refusing to charge the jury as requested.

Dated: November 18, 1957.

Respectfully submitted,

/s/ KENNETH A. BARWICK,
Attorney for Defendant.

Points and Authorities

Rule 33 Federal Rules Criminal Procedure.

Affidavit of service by mail attached.

[Endorsed]: Filed November 20, 1957. [42]

[Title of District Court and Cause.]

RENEWAL OF MOTION FOR JUDGMENT
OF ACQUITTAL

May It Please the Court:

Now comes the defendant and moves the Court for a Judgment of Acquittal for each and every one of the following reasons:

1. There is no evidence to show that the defendant is guilty as charged in the Indictment.
2. The Government has wholly failed to prove a violation of the Act and Regulations by the defendant as charged in the Indictment.

3. The undisputed evidence shows that the defendant is not guilty as charged.

4. The Universal Military Training and Service Act as construed and applied by the regulations thereunder, and more particularly Section 1641.3 of the Selective Service Regulations, is unconstitutional because it deprived the defendant of due process of law, contrary to the Fifth Amendment to the United States Constitution.

5. Section 1641.3 of the Selective Service Regulations [44] deprived the defendant of procedural due process of law at the trial because it denied the defendant of his right to a full and fair hearing upon the question of whether he actually received the notice requiring him to report for induction.

6. The Universal Military Training and Service Act as construed and applied by the regulations thereunder and more particularly Section 1642.2 of the Selective Service Regulations, is unconstitutional because it deprived the defendant of due process of law, contrary to the Fifth Amendment to the United States Constitution.

7. Section 1642.2 of the Selective Service Regulations deprive the defendant of procedural due process of law at the trial because it denied the defendant of his right to a full and fair hearing upon the question of whether he actually received the notice requiring him to report for induction.

Wherefore, the defendant prays that a Judgment of Acquittal be rendered and entered.

Respectfully submitted,

/s/ KENNETH A. BARWICK,
Attorney for Defendant.

Points and Authorities

Rule 29 Federal Rules Criminal Procedure.

[Endorsed]: Filed November 20, 1957. [45]

[Title of District Court and Cause.]

MINUTES OF THE COURT
DECEMBER 2, 1957

Present: Hon. Jacob Weinberger, District Judge;
U. S. Atty., by Assistant U. S. Atty.: John
K. Duncan. Counsel for Defendant: Ken-
neth Barwick.

Defendant present on bond.

Proceedings:

For (1) hearing motion of defendant for new trial, (2) hearing report of Probation Officer and sentence. (Verdict of guilty.)

Attorney Barwick renews motion for judgment of acquittal. Court orders said motion denied.

Court orders motion for new trial denied.

It Is Adjudged that defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

eighteen months and pay a fine in the sum of \$500 unto United States, for offense charged in the one count of the Indictment.

It Is Adjudged that execution of sentence is hereby stayed until December 13, 1957, at 10 a.m.

JOHN A. CHILDRESS,
Clerk;

By /s/ E. M. ENSTROM, JR.,
Deputy Clerk.

JW-12/2/57. [46]

United States District Court for the Southern
District of California, Southern Division

No. 26,877-Criminal

UNITED STATES OF AMERICA

vs.

CARLIN CONSTANTINE VENUS

JUDGMENT AND COMMITMENT

On this 2nd day of December, 1957, came the attorney for the government and the defendant appeared in person and by counsel, Kenneth Barwick.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of knowingly failing to report for induction into the armed forces of the United States, in violation of U.S.C., Title 50, App., Sec.

462(a), as charged in the Indictment in one count, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of eighteen months and pay a fine in the sum of \$500.00 unto the United States.

It Is Adjudged that execution of sentence is hereby stayed until December 13, 1957, at 10:00 a.m.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ JACOB WEINBERGER,

United States District Judge.

[Endorsed]: Filed December 2, 1957. [47]

[Title of District Court and Cause.]

NOTICE OF APPEAL

The appellant is Carlin Constantine Venus and he resides at 302 Market Street, Apartment 3, Venice, California.

The attorneys for the appellant are Hayden C. Covington, Attorney at Law, 124 Columbia Heights, Brooklyn 1, New York, and Kenneth A. Barwick, Attorney at Law, 7918½ Broadway, Lemon Grove, California.

The appellant was charged with wilfully and knowingly violating a duty required by the Universal Military Training and Service Act.

The appellant was sentenced to confinement in a federal institution for a period of 18 months on the 2nd day of December, 1957; execution of said judgment having been stayed until December 13, 1957.

The appellant is not at this time in any institution but remains out on bail.

I, the above-named appellant, hereby appeal to the United [48] States Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated this 6th day of December, 1957.

/s/ CARLIN CONSTANTINE
VENUS,
Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed December 10, 1957. [49]

In the United States District Court Southern
District of California, Southern Division

No. 26877—Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CARLIN CONSTANTINE VENUS,

Defendant.

Honorable Jacob Weinberger, Judge Presiding.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

San Diego, California

November 13, 14, 15, 1957

December 2, 1957

Appearances:

For the Plaintiff:

LAUGHLIN E. WATERS,

United States Attorney, By

JOHN DUNCAN,

Assistant United States Attorney.

For the Defendant:

KENNETH A. BARWICK, ESQ.

* * *

HELEN A. HAISCH

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Will you be seated please by the flag? Please state your name.

The Witness: Helen A. Haisch. [6*]

The Clerk: The last name is spelled how?

The Witness: H a i s c h.

The Clerk: H a i s c h?

The Witness: Yes, c h, yes.

The Clerk: Thank you.

Direct Examination

By Mr. Duncan:

Q. Is that Haisch (Haish) or Haisch (Hoish)?

A. Haisch (Hoish).

Q. It is Mrs. Haisch? A. Yes.

Q. Mrs. Haisch, would you tell us please your business or occupation.

A. I am clerk of Local Board 140 for selective service system.

Q. And how long have you been employed in that capacity? A. Since 1950.

Q. Tell us something about the duties of a local board clerk, Mrs. Haisch, generally and briefly.

A. Well, she is, first of all, of course, charged with the custody of all the files in her local board. She takes care of all correspondence and sees that it is filed in the folder of the registrant to whom it

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Helen A. Haisch.)

belongs. And she attends board meetings, takes care of all the files for the board members; and, if there are personal appearances, she takes the [7] notes and keeps a record of all those. We keep a record of all classifications. And, well, my job is really very——

Q. It covers a broad field? A. It does, yes.

Q. Tell me, Mrs. Haisch, do you have custody personally of the selective service file of the defendant, Carlin Venus? A. Yes, I have.

Q. Are you the person that is charged with that custody? A. Yes.

Q. Do you have it with you today?

A. Yes, I have.

Mr. Duncan: May I have this file marked for identification, your Honor.

The Court: Government's 1.

The Clerk: It is so marked, your Honor.

(Defendant's Selective Service File marked as Government's Exhibit No. 1 for Identification.)

Q. (By Mr. Duncan): I am now handing you the file that you just handed me, Mrs. Haisch. Would you describe to us, if you will please, just what that is. A. This is the file—you mean the——

Q. The whole exhibit there.

A. Well, this is the complete file of all the records for this registrant since the day he registered.

Q. To your knowledge, that is a full and complete file; [8] is that right?

(Testimony of Helen A. Haisch.)

A. Yes. Yes, that is true. Everything pertaining to him that has been sent into the office is in this file.

Q. You are required by regulations, are you not, to keep that file all together?

A. Yes. Oh yes, absolutely.

The Court: That has to do with the case of the defendant?

The Witness: Yes, sir. This particular registrant, yes, sir.

Q. (By Mr. Duncan): That is the file of Carlin Venus, isn't it? A. Yes, it is.

Q. Those records that are contained in that file, Exhibit for Identification Number 1, Mrs. Haisch, are they prepared in the routine of the operation of the board, as a routine procedure to prepare those records? A. Yes. Yes, it is.

Q. Mrs. Haisch, you have seen the defendant, Carlin Venus, before, have you not?

A. Yes, I have.

Q. And do you recall about the last time you saw him?

A. Well, the last time, I don't recall the exact date. It was, oh, probably a month or so ago; he——

Q. And did you see him some time before [9] that? A. I have seen him before that; yes, sir.

Q. And do you recall the time preceding about a month ago that you saw him?

A. Yes, I do. That was in April when he was in the office.

Q. Is that April of this year? A. Yes, sir.

(Testimony of Helen A. Haisch.)

Q. And do you recall the specific date, by any chance? A. Well, April the 25th was the date.

Q. And where was it that you saw him at that time? A. In the office; our office.

Q. And did you have any conversation with him?

A. Yes, I did.

Q. Was anybody else present at that conversation? A. He brought with him a friend.

The Court: I beg your pardon?

The Witness: He brought a friend with him at the time, and also our co-ordinator, Mrs. Huckaby, in the office.

Q. (By Mr. Duncan): Did he tell you what the friend's name was, do you recall, by any chance?

A. I don't recall the name. However, it is written in the note that I wrote for me, because he wanted a friend to help him.

Q. What happened that day?

A. Well, he came into the office, and he had with him [10] his typewriter and asked that he could copy some of the information from his file.

Q. Did you give him the file?

A. No, I did not. I took him into the office, and we sat down at a desk, and I opened the file and told him that he could copy anything he liked out of it, in my presence, of course.

Q. Did you see him look through the file?

A. Yes, I did.

Q. Did he go through the whole file? Did you see him? A. Yes. Yes, sir, he did.

Q. Do you remember about how long it took him?

(Testimony of Helen A. Haisch.)

A. Well, it took several hours. I don't know. Two or three hours, I should say. I don't recall.

Q. It was a long period of time? It wasn't five minutes?

A. Oh, yes. Yes; much longer than that.

Q. Did the friend assist him in going through the file?

A. Yes, he did. He copied some of the information.

Q. And the two of them sat there in your presence and went through the file; is that it?

A. Yes, sir.

Q. Was Mrs. Huckaby there?

A. She came—I went to lunch, and she came and sat with him while I was at lunch.

Q. Now, Mrs. Haisch, will you open that file please. [11]

The Court: I think we will suspend at this time for the noon period.

Mr. Duncan: I have exceeded my minute and a half, judge.

The Court: Yes, your minute and a half was being extended; so we will give you plenty of time.

We will suspend at this time until 2:00 o'clock. Ladies and gentlemen, please keep in mind and observe the admonition heretofore given.

Is it satisfactory to counsel if I merely call the attention of the jury to the admonition rather than repeat it?

Mr. Barwick: Yes, your Honor; that is satisfactory.

(Testimony of Helen A. Haisch.)

The Court: Very well.

You are now excused until 2:00 o'clock. Recess at this time.

(Whereupon at 12:00 o'clock noon a recess was taken until 2:00 o'clock p.m. the same day.) [12]

Wednesday, November 13, 1957—2:00 P.M.

The Clerk: The case on trial: United States versus Venus.

The Court: Do you stipulate the jurors and the defendant are now present?

Mr. Barwick: I so stipulate, your Honor.

Mr. Duncan: It is so stipulated.

The Court: Proceed.

Mr. Duncan: Will you take the stand again, Mrs. Haisch.

Direct Examination

(Continued)

By Mr. Duncan:

Q. Mrs. Haisch, I am now handing you again Government's Exhibit for Identification Number 1 which you previously identified as the selective service file of Carlin Venus. I ask you now, Mrs. Haisch, to open that file, if you will please, and see if you can locate this Order to Report for Induction which is dated October 28th of 1955.

A. Yes, I have it. Yes, I have it.

Q. Did you find it? A. Yes.

Q. Mrs. Haisch, was that copy there the original

(Testimony of Helen A. Haisch.)

or what? Would you tell us please, how an Order to Report for Induction is prepared. [13]

A. Well, it is prepared with the original and carbon copy. This is the carbon copy of the original.

Q. And do you remember in this case what was done with the original?

A. No. It was folded and placed in the envelope together with instructions and mailed to the registrant at this address typed on the order for induction.

Q. Did you mail it yourself?

A. Yes, I did. I remember it, because I initialed a board member's initial on the copy, the carbon copy.

Q. Your initial is "H. H." appearing on that carbon?

A. No, I initialed "J. L." only. The original order for induction is signed by a board member himself, so I initialed the board member's initial on this copy so that I would know the board member who had signed the original order.

Q. And you are the individual that placed the initials "J. L." on that copy, is that right?

A. Yes. Yes, I am.

Q. Now, Mrs. Haisch, this original order which was placed in the mail, have you ever seen it since that time?

A. No, sir, I have not.

Q. What normally happens when you send an order out, and it is not received by the individual to whom it is directed?

A. It is returned to us by the post office marked

(Testimony of Helen A. Haisch.)

“Moved,” or whatever the case might be—“Left no Address”—[14] but it is returned by the post office.

Q. And I take it that the original in this case was never returned to you by the post office?

A. No, sir.

Q. Now, I want to get back, Mrs. Haisch, to the day of April 25th of 1957. You testified that the defendant and one other individual came to the local board at that time and, in your presence, went over this file?

A. Yes, that is correct.

Q. They went over the file that is Exhibit Number I for Identification, is that right?

A. Yes, sir. Yes, they did.

Q. And did you assist in that in any way, Mrs. Haisch? Did you point out any documents to either the defendant or the other person?

A. Yes. We went over it more or less together, and I did show him his Order to Report for Induction.

Q. You showed him that Order to Report for Induction?

A. Yes.

Q. That copy, is that correct?

A. Yes.

Q. That was on April the 25th of 1957?

A. I showed it to him, and I said, “This is the copy of the original mailed to you on this date and to the address written on the order.” [15]

The Court: What is the date of that order?

The Witness: October the 28th, it was made, 1956. Is that right or—wait a minute.

Mr. Duncan: 1955, I believe.

(Testimony of Helen A. Haisch.)

The Witness: 1955, yes. I'm sorry. October 28, 1955, it was made.

The Court: The order to report, is that it? Is that the one that bore that date?

The Witness: Yes, sir.

The Court: October what?

The Witness: 28th, 1955.

The Court: That is the date of the order?

The Witness: The date the order was mailed.

The Court: The date of the mailing?

The Witness: Yes, sir.

Q. (By Mr. Duncan): As a matter of fact, that date appears right over the wording "Date of Mailing," doesn't it, Mrs. Haisch?

A. Yes. Yes, it does.

The Court: Did the order have a date written—

The Witness: For him to report?

The Court: Yes.

The Witness: Yes, sir. There is a mailing date on it and also a reporting date.

The Court: It is a duplicate of a form, is it? [16]

The Witness: Yes.

The Court: Of a formal order?

The Witness: Yes, sir. It reads: "Order to Report for Induction."

The Court: And what is the date of the order?

The Witness: The date of mailing?

The Court: No, the date of the order.

The Witness: Oh, for him to report?

(Testimony of Helen A. Haisch.)

The Court: No, the date the order is signed. Does that bear a date?

The Witness: October 28th, 1955.

The Court: When it was made?

The Witness: Is the date of mailing.

The Court: Does it have a date on the order when it was issued?

The Witness: Oh, you mean the form issuance? That is on the date the form was issued?

The Court: Yes.

The Witness: Yes, it is a Revised Form 1950.

The Court: That isn't what I mean.

The Witness: That isn't what you meant?

Mr. Duncan: Your Honor, I don't believe there is any other date than the date of mailing.

The Witness: And the date of reporting; that is right. [17]

The Court: This is a copy of the order that was mailed out?

The Witness: Yes, sir.

The Court: Do you have a record of where it was mailed to?

The Witness: Yes, sir.

Q. (By Mr. Duncan): Would you tell us please, the address to which it was mailed, Mrs. Haisch?

A. It was mailed to 1431—10th Street, Modesto, California.

Q. And would you tell us, please——

The Court: What street is that?

The Witness: Tenth. Tenth Street.

Q. (By Mr. Duncan): Would you tell us please

(Testimony of Helen A. Haisch.)

Mrs. Haisch, where it was that you got that address of 1431—10th Street?

A. From a letter received from the registrant.

Q. Was that within the file?

A. Yes, the letter is here.

Q. Would you see if you can find that letter please? A. Yes.

Mr. Barwick: John, can I help? I can tell her what number it is. It is number 141.

The Witness: Thank you.

Yes, the letter is here. And it was written June 7th, 1954. [18]

Q. (By Mr. Duncan): Would you read that letter to us please, Mrs. Haisch.

A. It is addressed to Local Board 140, Fox Theater Building, Room 205, 1215-7th Avenue, San Diego, California:

“Dear Ladies and Gentlemen:

“At this time I wish to inform you of my departure from San Diego to Modesto, California because of secular employment. The Federal Bureau of Investigation I have notified when in Los Angeles after induction proceedings. My new address is 1431-10th Street, Modesto, California. Same employee”—“same employer”—he has here—“but can be reached within one or two days at my San Diego address.

“Thanking all of you, remain

“Sincerely or respectfully,

“/s/ CARLIN VENUS.”

(Testimony of Helen A. Haisch.)

Q. Do you know whether or not there is any letter in the file after that date, Mrs. Haisch, of June 7th, 1954, indicating a different address for the defendant?

A. Yes. Yes, I have other—since received changes of address for him.

The Court: Before we get to that: Now, what appeared on the mailing address, on the mailing envelope? What was on that envelope when it was mailed out?

The Witness: The address, the same address that is on the Order to Report for Induction.

The Court: The name?

The Witness: Yes, sir; the name and the same address.

The Court: Whose name? [19]

The Witness: Carlin Venus; Carlin Constantine Venus.

The Court: The same address. What else appears on there?

The Witness: The envelope?

The Court: The envelope.

The Witness: His name in full and his address, mailing address in Modesto.

The Court: Was there any return address?

The Witness: Oh, yes. Our selective service envelopes always have the return address.

The Court: What does it say?

The Witness: It says, "Return to Sender." And then there is a box, and we stamp the local board

(Testimony of Helen A. Haisch.)

stamp in that box, our name and address, our local board and office address.

The Court: That all appeared on the return envelope?

The Witness: Yes, sir.

The Court: Do you have a copy of that in the file?

The Witness: I don't believe we do.

The Court: Can we state exactly what was in the box that you say was stamped?

The Witness: The box?

The Court: Yes.

The Witness: It says: "Local Board 140, Fox Theater Building, Room 205, 1215-7th Avenue, San Diego 1, California." [20]

The Court: What else does it say on there in connection with the box?

The Witness: Above it I believe it says: "Return to Sender."

The Court: "Return to Sender?"

The Witness: Yes.

The Court: Then the address?

The Witness: Then, of course, up at the top it is "Official Business"—"Selective Service System Official Business."

The Court: Go ahead.

Q. (By Mr. Duncan): Mrs. Haisch, after June 7th, 1954, and before October 28th, 1955, did you receive any other letters indicating another address from the defendant?

A. Yes. Let's see. We received one on April 10, 1956.

(Testimony of Helen A. Haisch.)

Q. Is that the next letter you received, to your knowledge?

A. The change of address; yes, sir.

Q. Now, every letter and every bit of correspondence concerning a registrant goes in that file, doesn't it?

A. Yes, it does.

Q. That is part of your job, to put those things in that file?

A. Yes, sir.

Q. To the best of your knowledge, every document and [21] every letter concerning this defendant is in that file, isn't it?

A. Yes, it is.

Mr. Duncan: I have nothing further.

Mr. Barwick: If the Court please, may I question the witness from the counsel table?

The Court: What is that?

Mr. Barwick: May I question the witness from the counsel table?

The Court: Oh, yes, go right ahead.

Cross-Examination

By Mr. Barwick:

Q. Mrs. Haisch, approximately, to the best of your knowledge, how many selective service registrants do you have in your files in your office?

A. In my local board?

Q. Yes.

A. Or you mean in the selective service office?

Q. No, in your local board that you have charge of?

A. Oh, more than seventeen thousand.

The Court: More than what?

The Witness: Seventeen thousand.

(Testimony of Helen A. Haisch.)

The Court: Seventeen thousand?

The Witness: Yes, sir.

The Court: Would you keep your voice up please.

The Witness: Surely. [22]

The Court: These acoustics here are not very good, and it is difficult for me to hear. Although the people in the rear of the courtroom can hear, I can't.

The Witness: All right.

Q. (By Mr. Barwick): And you are personally the custodian of all those records?

A. Yes, I am. I am responsible for them.

Q. And is it your personal duty to mail out all the notices of any nature, or do you delegate some of your responsibilities to other clerks in the office?

A. Some of my work is done by others, yes.

Q. Now, when it comes to mailing out a classification card or an order to report, do you do that personally or do you delegate it, or both?

A. Well, I usually——

Mr. Duncan: I will object to that question, your Honor. We are only concerned with what happened here.

The Court: Only what?

Mr. Duncan: We are only concerned with what happened here.

The Court: You are asking about a custom?

Mr. Barwick: Yes, your Honor.

Mr. Duncan: I have no objection to counsel's showing the full picture of what happens at the local

(Testimony of Helen A. Haisch.)

board, but the witness has already testified that she is the one that sent [23] this order.

The Court: I take it he is testing the memory of this witness. She may answer.

The Witness: Will you please repeat the question.

Q. (By Mr. Barwick): Yes. Do you personally mail out all the notices of classification and orders to report, or do you delegate some of that specific responsibility to another clerk?

A. Well, some of the work is done by others, but the orders for induction, those I usually send out myself if I am in the office.

Q. And if you are not in the office, is it possible that someone else does it?

A. Yes, if I am not there.

Q. Is there any way to tell who did it in a specific case?

A. Yes; in this specific case there is a way to tell.

Q. And how is that?

A. Because I initialed the carbon copy of the order.

Q. Now, do you actually recall mailing this particular order?

A. Yes, I do, because I knew Mr. Venus, and I remembered mailing it.

Q. And do you have a regular mail box that you put all your mail in? A. Yes. [24]

Q. And on this occasion did you put this particular letter in that box?

A. I can't say that I put it in the mail box. I

(Testimony of Helen A. Haisch.)

put it in the box in our office, mail box in our office.

Q. Who picks the mail up from the mail box in your office?

A. Usually one of us clerks takes the mail over and puts it in the box before or at the close of business for the day.

Q. You have a specific receptacle in your office then where you put all your out-going mail?

A. Yes, that is correct.

Q. Who goes and gets the mail out of the receptacle?

A. One of the clerks puts the mail together, bundles it and puts a rubber band around it. The out-going mail, we put "Out of Town" on it, and the local, we put a local—little something that is furnished to us by the post office. And we put rubber bands around them. And one of the clerks is responsible for the mailing of all our mail.

Q. Then, in other words, you didn't actually mail this notice; you merely put it in the box within your office to be mailed?

A. Yes. I don't recall if I mailed it that day or not.

Q. In other words, some days you have the chore of collecting it out of the box and taking it over, and then on other days someone else might do it; is that correct? [25] A. That is correct.

Q. And on this particular day all you recall doing is putting it in the box within the office?

A. Yes.

(Testimony of Helen A. Haisch.)

Q. But that is not a government mail box; that is just——

A. Well, it is too, because we are a government office. So in a way it is a government mail box. We are responsible for it to see that it gets in the box.

Q. It is not a regular postal box from which a governmental employee would come and get mail out of it? A. No.

Q. When did you initial the order to report, the copy you have, which is part of the exhibit? When did you make that initialing?

A. After I had written out the order. And placing his order in the envelope, then I initialed the carbon copy.

Q. Then, in fact, a carbon copy could be initialed and never be mailed?

A. You mean the carbon copy never be mailed?

Q. No, the original.

A. The original? I doubt that.

Q. It could happen?

A. Oh, I suppose anything is possible, but——

Q. What I mean is the initialing takes place before it is mailed? [26]

A. The initialing is usually while I can see the order original to see who signed it. That is when I initialed it, so——

Q. So, the fact that the duplicate is initialed does not mean that you put it in the mail box?

A. No.

Q. It only means that you have prepared it? You

(Testimony of Helen A. Haisch.)

have addressed an envelope and put the original in the envelope? And then you initial the duplicate?

A. That is right.

Q. You don't have a duplicate copy of the envelope, do you?

A. No. Who would ever make a duplicate copy of an envelope?

Q. Well, you don't have one? A. No.

Q. Then, there is no way of knowing whether the envelope was properly addressed?

A. Well, if the order was properly addressed, then the envelope was properly addressed.

Q. And why do you reach that conclusion?

A. Because we have copied the address from the order on to the envelope.

Q. Is all your copy work always accurate even to a—— A. The boys get their mail. [27]

Q. Do you ever have letters come back that you misaddressed?

A. Probably. I don't recall any at the moment.

Q. In other words, the fact that 1431-10th Street appears on the original order that goes inside the envelope doesn't necessarily mean that 1431-10th Street appeared on the envelope itself?

A. I don't know that it does, but——

Q. In other words, it is two separate manual tasks: One, you could address the envelope 1431-10th Street—and that we can see; we have a copy—but the actual envelope itself you don't have a copy of?

The Court: She has already stated that.

The Witness: No, I don't have a copy of that,

(Testimony of Helen A. Haisch.)

but I was very careful to see that envelope was addressed properly. That, I recall.

Q. (By Mr. Barwick): I recognize the fact that you are very careful. I am not trying to impugn that you are not careful.

Directing your attention, Mrs. Haisch, to the Minute Cover—well, it is called Minutes of Action—you are familiar with that particular section?

A. Yes.

Q. And I believe it is Page 2, the second page, starting with "1-22-53." [28]

A. Yes, I have it.

Q. I notice after the item marked "1-22-53" you have got your initials "H. H."

A. That is correct.

Q. And for the next one, two, three items that you got there entered you have your initials marked "H. H." A. Yes, that is right.

Q. Then, after the item on May 4th there is no initial. A. That is correct.

Q. And on May 20th and May 26th and June 3rd there are no initials. A. That is correct.

Q. Then, the following items, numbering one, two, three, four, five, six in number, are all initialed.

A. Yes.

The Court: How is anybody to know what you are talking about?

Mr. Barwick: I have referred to the file, the page of the folder.

The Court: Has that been marked as an exhibit for identification?

(Testimony of Helen A. Haisch.)

Mr. Barwick: That is a photostatic copy she has got.

The Court: Well, the entire file has been marked, but is there some specific part of the file that you are alluding to now? [29]

Mr. Barwick: Yes.

The Court: Do you want to mark that specific file?

Mr. Barwick: It is called the Minutes of Action. It has a specific number.

The Court: I see. All right.

Q. (By Mr. Barwick): Now, after each one of those items you have your initials "H. H." When do you make this notation on this minute entry?

A. You mean when do I write these minutes?

Q. Yes.

A. Well, whenever any action is taken that requires the minutes be written on the back. Then I write them at the time.

Q. Then, at the actual time you do the thing that is referred to, you write it on the minute action?

A. Yes.

Q. And then you initial it?

A. Yes, in some instances.

Q. Pardon?

A. Yes, I initial them in some instances. I don't always initial them.

Q. In which instances do you initial them? Are there any specific ones?

A. Well, if I write it on the typewriter, ordinarily I do put my initials after them. However, if

(Testimony of Helen A. Haisch.)

[use a stamp— [30] we do have several different kinds of stamps in the office—then I do not initial them, because that would mean putting the cover sheet in the typewriter to put the initials on. And I do not initial it when I use a stamp.

Q. Directing your attention to June 3rd, 1954, entry, I find the initials "A. W. R." after that entry. A. That is "B." That is "A. W. B."

Q. "A. W. B.?" A. Yes.

Q. Is that some other clerk's initials?

A. No, that is a board member's initials.

Q. Directing your attention to "9-1-55" on the minute cover. There are some initials there. Do you know whose initials those are?

A. "J. L." That is a board member; Joseph Levikow.

Q. Then, ordinarily if a board member makes an entry, they initial it after the entry?

A. Yes. Yes, they do.

Q. Did Mr. Venus ever come into your office after October 28th, 1955, on any occasion other than that April 25th meeting?

A. Of '55, did you say?

Q. Yes. That was when he was sent the order to report.

A. I don't recall him coming into the office at any time except in April, and then since, I don't recall it. [31]

Q. Directing your attention to the letter that the defendant wrote you notifying you of the change of

(Testimony of Helen A. Haisch.)

address to Modesto, which is Item Number 21 in the file, the letter being dated June 7th, 1954.

A. Yes, I have it.

Q. Do you recall receiving that letter and reading it? A. Yes, I do.

Q. And do you recall, in addition to the fact that there is a Modesto address, that the last line of the letter reads: “* * * but can be reached within one or two days at my San Diego address?”

A. That is right. Yes, I remember it.

Q. Now, when you sent out the notice to report to Mr. Venus, you heard nothing from him; is that correct? A. That is correct.

Q. Did that puzzle you?

A. Well, yes it did; because I thought it strange that he had not reported for induction since he had been ordered to.

Q. Did you recall at that time this portion of the letter, that he could be reached at his San Diego address?

A. I saw no reason to use the San Diego address. He received the letter at the Modesto, California address; because it wasn't returned by the post office. So I saw no reason to use his San Diego [32] address.

Q. In other words, you assumed that by the fact that the letter didn't come back that he had received it and, therefore, there was no need to notify him at the San Diego address?

A. That is correct.

Q. Now, you are quite familiar with this regis-

(Testimony of Helen A. Haisch.)

trant's whole file? A. I believe so.

Q. And his history before the Board?

A. I believe so, yes.

Q. Would you characterize his attitude, his promptness in reporting or lack of it as good or bad?

A. Well——

Mr. Duncan: I will object to that, your Honor. That is incompetent——

The Court: Just a minute. Let me have that question.

(Question beginning with Line 11 and ending with Line 12, Page 33 reread.)

The Court: The objection is sustained.

Q. (By Mr. Barwick): According to the selective service file that you have before you, was Mr. Venus always prompt in notifying the Board of any change in his addresses?

The Court: That is argumentative. It is along the same line. The record will speak for itself whatever has been done. [33]

The Witness: I am not to answer that, am I?

The Court: Pardon?

The Witness: I am not to answer that, am I?

The Court: We will see in just a moment. We will see if the United States Attorney has anything to say about it.

Mr. Duncan: Are you finished, counsel?

The Court: I think that last question is in line with the previous question to which the objection was sustained. The record will speak for itself.

(Testimony of Helen A. Haisch.)

Mr. Barwick: All right, your Honor. I will withdraw the question.

Q. Directing your attention to the cover sheet of the registrant's file, how many changes of address do you find there?

Mr. Duncan: I will object to that, your Honor. The record can speak for itself. This record can speak for itself.

Mr. Barwick: If the Court please, it is going to be much easier for the jury to be told some of these things than have to go through a hundred and fifty pages of items to find out how many times he reported or changed his address. I am only trying to help get the facts in front of the jury. They can look at this all day and not discover some of these items.

The Court: Let me see this exhibit that you [34] are inquiring into.

Mr. Barwick: Here is a photostatic copy of it.

The Court: Yes.

You have reference to addresses previously changed, is that correct? Is that your question?

Mr. Barwick: And subsequent, your Honor.

The Court: Are there any subsequent to what has already been testified to?

Mr. Barwick: I believe the file shows that there are subsequent addresses after the Modesto that are listed in his folder that he sent in.

The Court: I see.

Mr. Barwick: There are also a large number of prior.

(Testimony of Helen A. Haisch.)

The Court: She may answer.

The Witness: Would you ask the question again please?

Q. (By Mr. Barwick): I believe it was phrased this way: In the cover sheet of this registrant's file how many changes of address do you find listed there? A. There are eight.

Q. Are any of those subsequent to the Order to Report for Induction? A. Yes.

Q. How many? A. Two.

Q. Directing your attention to this conversation on [35] April 25th, 1957, did you or did you not at that time tell the defendant, Mr. Venus, that the matter was out of your hands and was up to the United States Attorney?

Mr. Duncan: I will object to that as being irrelevant and immaterial.

The Court: The objection is sustained.

Q. (By Mr. Barwick): Did you at that time tell the defendant that he had a duty to report?

A. I don't recall.

The Court: The answer was?

The Witness: I don't recall.

Q. (By Mr. Barwick): Do you recall the defendant's asking you at that time, "What procedure do I follow now?" A. No.

Q. You just don't recall? A. No.

Q. Do you recall anything that the defendant asked you on that occasion? A. Certainly.

The Court: Just a minute. What about this line of questioning? She is a clerk in the office; she is not a board member.

(Testimony of Helen A. Haisch.)

Mr. Duncan: Well, I went into the April 25th meeting, your Honor. I suppose it is proper to bring out all the facts surrounding that meeting. [36]

The Court: Was this during a meeting, or was it just an informal visit you refer to?

Mr. Barwick: It is an informal visit, your Honor, but it bears highly on the question of his intent.

The Court: I beg your pardon?

Mr. Barwick: It bears quite strongly on the question of his intent.

The Court: April, 1957; that is this year, is that correct?

Mr. Barwick: Yes, your Honor.

The Court: Do you understand the question, ma'am?

The Witness: Yes. He wanted to know if I remembered anything the registrant said.

Is that what you said?

Q. (By Mr. Barwick): Yes.

A. Why, certainly I remember. He came into the office and asked if he could see his file, and I said absolutely he certainly could. So I asked him to come in, seated him at a desk, and got his file for him, and opened it open. And he started looking through it. We looked through it together and discussed it together. And he wanted to see his Order to Report for Induction. We got that out, and he reviewed all of it. And he also had a friend with him who helped him copy the information from the file. And I stayed with him while he copied it. [37]

(Testimony of Helen A. Haisch.)

Q. Now, that you have refreshed your memory by repeating it, do you recall anything, in substance, wherein he asked you, "What do I do?"

A. Why would he ask me a question like that?

Q. I don't know why.

A. I couldn't tell him what to do. I couldn't tell him what to do.

Q. I just want to know if he did.

A. No, I don't recall him asking me, "What do I do?"

Q. Did he ask you?

A. I don't recall him asking me that. I do recall something he said.

The Court: What is that?

The Witness: I said I do recall something he said, but probably that would be out of order.

Q. (By Mr. Barwick): No, anything he said would be in order if you can recall it.

A. Well, he did say that if he had gotten his Order to Report for Induction, of course, he would have refused induction.

Q. I see. A. He did say that.

Q. Do you recall during that conversation, being asked whether the Board had ever received a post card written by the defendant from Modesto and mailed to the Board showing a [38] change of address?

A. Yes, he asked the question. And I said if we had received the card, it would have been in the file.

Q. Then, you do remember something more than what you have just stated. You do remember that?

(Testimony of Helen A. Haisch.)

A. I remember that, yes.

Q. Do you recall the defendant's mentioning a letter that he had written in September of 1956, to the Board requesting that he be not considered delinquent? Did you have a discussion about that letter?

A. I don't recall.

Q. I direct your attention in the file to September 4th, 1956, Item Number 26.

A. Yes.

Q. Would you please read that letter to the jury.

Mr. Duncan: I will object to that, your Honor.

That letter will speak for itself.

The defendant can call Mrs. Haisch as his own witness if he desires and go into this exhibit more particularly. I went, simply, into the happenings on April 25th of 1957, and this is exceeding the scope of the direct examination when he goes into another letter on an entirely different thing.

The Court: I would like to see the letter.

Mr. Barwick: This is a photostat.

The Court: Is this a copy of the letter? [39]

The Witness: Yes, sir. This is the original here; yes, sir.

The Court: I will take your letter.

The Witness: All right. Surely.

The Court: I am going to excuse the jury for a few minutes. You are excused for a few minutes. Please keep in mind the admonition.

(Whereupon the jury retired to the jury room, and the following proceedings were had outside the presence and hearing of the jury:)

(Testimony of Helen A. Haisch.)

The Court: Now, I want some information from counsel here. This file has been introduced.

Mr. Duncan: It hasn't been introduced yet, your Honor.

The Court: What is that?

Mr. Duncan: It hasn't been offered yet.

The Court: It has been referred to. And are you going to offer the entire file in evidence?

Mr. Duncan: I am still contemplating that, your Honor.

The Court: I want to know that before I can pass on this matter.

Mr. Duncan: I think I will offer the entire file, your Honor.

The Court: This is part of the file, is it not?

Mr. Duncan: Yes, it is part of the file, your Honor, [40] but the thing that I have an objection to is I referred on direct examination——

The Court: Can you come forward.

Mr. Duncan: I'm sorry. I beg your pardon.

I referred on direct examination to a conversation on April 25 of this year that the defendant had with the witness at the Board. Now, by referring to that conversation counsel then is attempting to have the witness read this letter in. Now, that is exceeding the scope of the direct examination, because he is emphasizing this letter; and the letter speaks for itself.

The Court: It seems to me this letter, reading it, is self-serving. He is talking about himself as to what he did, and he argues the matter somewhat. He

(Testimony of Helen A. Haisch.)

writes it to the local board. But if this entire file is going to be introduced, this is part of the file.

It is true parts of the file may not bear upon this subject matter, but here is a letter dated September 4, 1956. The notice that he is alleged to have ignored is dated——

Mr. Duncan: October 28, 1955.

The Court: ——1955.

Mr. Duncan: Eleven months before.

The Court: And the letter that he had previously sent in as to his change of address is dated June the 7th, 1954. Now, I don't know just what the scope ought to cover here [41] in this case.

Mr. Duncan: It has always been my impression, your Honor, that a letter should speak for itself. This letter, while it is a part of Government's Exhibit for Identification Number 1, there was no emphasis placed upon it on the direct examination. Now, this is a self-serving declaration. Nothing on direct examination referred to this letter. It should speak for itself. The jury should have the opportunity, your Honor, to review these letters and to place such emphasis on them as they desire, rather than having particular ones read to them.

I realize I had a letter read in. Perhaps it is not proper, but it went in without objection.

The Court: This, for example, says in here: "I have always complied with all the instructions of the Board. Never have I tried to avoid any duty by means of trickery." That is a gratuitous statement on his part. It is self-serving. "In other words,

(Testimony of Helen A. Haisch.)

therefore, I honestly object to your conclusion that I have been delinquent in advising the Board of my own matters. I concealed nothing and refused induction openly, because of being conscientiously opposed to combat and noncombatant service as an ordained minister, on May the 20th, 1954. I reported to the induction station because of receiving mail at my home address in San Diego. I definitely did not receive any other induction notice. And if I did, I would have [42] reported as before. After openly appearing at the marshal's office, I was put in jail on bail in August of '55, and my case was completely thrown out of court, as the case in the Supreme Court had been won that had bearing on my case * * *'' He argues the matter here, and he not only argues it but puts himself, by reason of that argument, in a favorable light.

I think all you are interested in is what the proceedings here concern.

Mr. Barwick: I will withdraw the letter if counsel will stipulate the file into evidence now.

Mr. Duncan: I am going to offer the whole file, your Honor. I just don't want emphasis placed on this particular letter, putting in the defendant's testimony during the government's case.

Mr. Barwick: That is right. I will withdraw it for that purpose if counsel will stipulate the file into evidence now.

The Court: But are you going to argue from the entire file at random? I don't know. It may have something to do with the previous case which we

(Testimony of Helen A. Haisch.)

have nothing to do with here at this time. It may have something to do with the war in China. I don't know.

Mr. Barwick: Naturally, I don't intend to spend any more time here arguing than is pertinent. And if we go through that file letter by letter determining what is and [43] isn't going to go in, we will be here a week.

The Court: The only thing we have before us in this case: Did he or did he not receive the letter? You have already developed the custom and the action in regards to the mailing of the letter. Now then, that would call for some burden or some explanation on the part of the defendant. There is a dispute about his having received the letter. There is in evidence the fact that he subsequently went into the office. There, that is correct, isn't it?

Mr. Duncan: Yes.

The Court: And discussed the matter with the witness and possibly others. He had a friend with him. The only material matters, I think, are in relation to these occurrences to determine what his intent was and knowledge in this matter. Now, if you go into another case that was thrown out, as he said, if you go into argumentative matters—the letter, for example, in which he attempted to give himself a good recommendation, in which he talks about trickery and all that, putting himself in a favorable light in relation to that portion of the letter—if you are going to go into all these matters, I am wondering just how far we should go.

(Testimony of Helen A. Haisch.)

Mr. Duncan: Your Honor, I intend to put the whole file into evidence, but I think the file should speak for itself, and that particular emphasis should not be put on any——

The Court: We don't want to divert the attention [44] of the jury here as to the issue at hand, the whole issue we have to determine: Did he or did he not receive the letter?

What was his state of mind in relation to this entire situation? So that the jury may have some knowledge as to either his prior or subsequent actions so as to determine his state of mind and determine his intent in relation to whether or not he desired to report for induction or not. Now, if you people can work out a formula to confine the evidence within proper bounds, we can probably make progress; but——

Mr. Duncan: This problem of putting in the whole selective service file is always raised in this type of case, and it has been the general procedure to do so; because it represents a true and fair picture to both sides. It gives the complete history of the whole case. And that is the reason, generally, defense counsel raises no objection to its going in; and the government wishes to have it in.

The Court: In a way, he makes a statement in this letter which is not in his best interest. That is not my affair to comment on that, but you are conducting the case, Mr. Duncan, and I am calling this to your attention so you can work out these problems from your point of view.

(Testimony of Helen A. Haisch.)

Mr. Duncan: I will at this time offer the complete file that has heretofore been identified as Government's Exhibit Number 1.

Mr. Barwick: I have no objection, your [45] Honor. I want it in. I will stipulate that it may be entered right now.

The Court: I may have something to say about that later on. This thing is going to take two weeks to try it. If you are going through every letter and cross-examine the witness on every document that is in the file, I am going to put a stop to it.

Mr. Barwick: I don't intend to, your Honor.

Mr. Duncan: The government doesn't intend to, either, your Honor. I think we will wind the case up in short order.

The Court: Very well.

The Clerk: The exhibit is marked Government's Number 1 in evidence then, your Honor?

The Court: It may be received in evidence subject, however, to further developments; and we will see whether there are some immaterial matters, immaterial to this situation, in the file.

Call back the jury.

Mr. Barwick: By that, does the Court mean to say it will exclude portions of the file later on?

The Court: Will what?

Mr. Barwick: Will exclude a portion of the evidence later on?

The Court: Will what?

Mr. Barwick: Exclude any portion of the [46] file.

(Testimony of Helen A. Haisch.)

The Court: I can't tell you what I might do. I don't know myself at this time. We will see. But the file is in evidence now.

(Government's Exhibit Number 1 for Identification was received in evidence as Government's Exhibit Number 1.)

(The proceedings were resumed within the presence and hearing of the jury:)

The Court: Do you now stipulate the jurors and the defendant are present?

Mr. Duncan: It is so stipulated.

Mr. Barwick: I so stipulate.

The Court: You may proceed.

Cross-Examination

(Continued)

By Mr. Barwick:

Q. Did you have a conversation on April 25, 1957, in your office with the defendant concerning a letter he had written to you on September 4, 1956?

A. I don't recall that letter in particular. We discussed several of the letters in his file, but I don't recall that one in particular.

Q. You don't recall discussing that particular letter?

A. No, not any more than some of the other information in here.

Q. Mrs. Haisch, do you recall the defendant's

(Testimony of Helen A. Haisch.)

asking [47] you a question, in substance, as follows: "Didn't it strike you as unusual that I didn't report?"

A. Yes, I remember him asking me that, and I said, yes, I thought it strange that he didn't report.

Q. And why did you give the answer "I thought it strange that you didn't report?"

A. Well, I thought he had received his order and that he would report.

Mr. Barwick: No further questions, your Honor.

Mr. Duncan: I have nothing further, your Honor.

The Court: That is all.

(Witness withdrew.)

The Court: That file may now be marked in evidence.

The Clerk: It is so marked.

(Government's Exhibit Number 1, Selective Service File, heretofore marked as Government's Exhibit Number 1 for Identification was then marked in evidence as Government's Exhibit Number 1.)

Mr. Duncan: The government rests, your Honor.

The Court: Do you have an opening statement at this time?

Mr. Barwick: Yes. If the Court please, I would like to make an opening statement.

The Court: Proceed.

(Whereupon followed an opening statement by defendant's counsel.) [48]

Mr. Barwick: At this time I would like to call the defendant to the stand, your Honor.

The Clerk: Will you be sworn.

CARLIN CONSTANTINE VENUS

The defendant, called as a witness in his own behalf, having been first duly sworn, was examined and testified, as follows:

The Clerk: Be seated please. Please state your name for the record.

The Witness: Carlin Constantine Venus, Venus, last name.

Direct Examination

By Mr. Barwick:

Q. And where do you live at the present time, Mr. Venus?

A. 302 Market Street, Venice, California.

Q. Directing your attention to 1954, in the fall of the year, where were you living at that time?

A. In Modesto, California; 1431-10th Street.

Q. And how long did you live at 1431-10th Street in Modesto?

A. From approximately June of 1954 to December, 1954.

Q. In June of 1954, where were you living prior to moving to Modesto?

Prior to moving to Modesto in June of 1954, where did you live?

(Testimony of Carlin Constantine Venus.)

A. 650-11th Street, San Diego. That was my parents' home address. [49]

Q. And have you notified the draft board that that was your address? A. Yes.

Q. And then, when you went to Modesto, did you notify the draft board of a new address?

A. Yes, I did.

Q. How did you notify them?

A. By mail; the letter of June 7th, 1954.

Q. Is that the letter that was read into evidence a short time ago? A. Yes.

Q. Did you ever leave Modesto after June, 1954?

A. I left from time to time, but I was always in close contact with the address within——

Q. What was the address at 1431-10th Street in Modesto? A. What was it?

Q. Yes. What was there?

A. It was a large building. It was a gymnasium.

Q. Did you work there? A. Yes, I did.

Q. Did you sleep there? A. Yes, I did.

Q. Did you receive mail there regularly?

A. Yes.

Q. When did you leave 1431-10th Street in Modesto? [50]

A. I left there around the fall of the year—the winter of the year of 1954. But I went back and forth to call to San Diego visiting my parents because of activity engaged in previous of this nature. And when I finally left Modesto to call, I helped my parents move in February of 1955. And then I notified them of this new address of my parents.

Testimony of Carlin Constantine Venus.)

Q. Just a moment. Now, you left Modesto in February of 1955, is that right?

A. That was——

Q. That was the last time?

A. Yes, as far as address goes.

Q. Just before you left did you notify the board of a new address?

A. It was about the same time, because I didn't know if I was going to stay in Modesto or if I was going to stay in San Diego. So I, after helping my parents move, I decided that that would be the address. And then, after I had made sure of that, I had moved in February of 1955. That was my new address, and I notified the draft board of that address.

Q. Now, what address is that? What address did you notify them of in February, 1955?

A. 1120-30th Street in San Diego.

Q. And that was your parents' home?

A. Yes.

Q. And you weren't living there, though? [51]

A. At that time I was, because I was waiting for another case.

Q. You moved back from Modesto to San Diego and resumed residence with your parents at 1120-30th Street? A. Yes.

Q. In February of 1955?

A. That is right.

Q. How did you notify the draft board of that new address? A. By mail; post card.

Q. Did you address the post card?

A. Yes; I did.

(Testimony of Carlin Constantine Venus.)

Q. Did you put it in the mail box?

A. Yes.

Q. Did anyone see you put it in the mail box?

A. Yes.

Q. And what did the card say on it?

A. I said: "This is to notify you of my new home address. You can contact me at this address at all times. Please send all mail to this new address as from the date of February"—I believe it was February 20th. I am not accurate on that, but it was a February date. I said, "as of February 20th." I will say that. I would. "Please send all mail to this new address: 1120-30th Street, San Diego." And I signed it, my name: "Thank you, Carlin Venus." Then, I put my draft board number right on the bottom of 4140529 or 578. [52]

Q. When was the next time you heard from the draft board or any agency of the United States Government concerning your draft status?

A. Well, it wasn't until April of 1956, or the beginning of the year of 1956 one. An F. B. I. agent contacted me, and he said that I was delinquent. And I said, "What? Delinquent for what?" And he said, "Well, you haven't notified the draft board of your address." He said, "They have you charged with wilfully and knowingly refusing induction." And I said, "Well, I don't even know what you are talking about, because I would never refuse to report for induction." And he said, "Well"—

Mr. Duncan: I will object to any more conversation with the agent as hearsay, your Honor.

(Testimony of Carlin Constantine Venus.)

The Court: That is when? April of 1956?

Mr. Barwick: Yes, your Honor.

The Court: I will sustain that objection at this point.

Mr. Barwick: May I say something, your Honor?

The Court: Yes.

Mr. Barwick: We are not interested in the truth or veracity of what the agent said. We are only interested in what effect it had on him. We don't care whether all the words are true or not. So in that sense, it is not hearsay. We don't care whether it is true. It is only: Did he hear it? [53] And what was his reaction to it? So for that purpose alone what the agent said ought to be admissible.

Mr. Duncan: I will withdraw the objection, your Honor, if a proper foundation is laid for the conversation.

Mr. Barwick: All right.

Q. Where did this conversation take place with the F. B. I. agent?

A. In an establishment called Physical Services. It is physical therapy. It is a gymnasium.

Q. Where? A. In Los Angeles.

Q. Who was present during the conversation?

A. Well, the employer saw me talking to the F. B. I. agent, but he wasn't there; he was in another room.

Q. Do you remember who the F. B. I. agent was?

A. I remember him if I see him, but I can't remember his name.

Q. Was anyone else present?

(Testimony of Carlin Constantine Venus.)

A. No; not in that room.

Q. Do you recall what he said and what you said? A. Yes; not clearly.

Q. Would you repeat it to the best of your recollection?

A. He asked me if my name was Venus, and I said, "Yes." And he said that he was representing the federal government, and that he had been notified to notify me as a matter of [54] myself not reporting for induction. And I said, "Well, I don't know what you mean, because I have never received any notice to report for induction." He says, "Well, obviously then there is something about your address. Maybe you didn't notify the draft board, or there is something in that connection that took place or didn't take place." And, as the conversation went, I said that I definitely would have reported if I would have received an induction notice, but I didn't. And I told him that I did at that time—I told him I mailed a card to the draft board of the 1120-30th Street address in February of 1955.

He said that a notice, a card, was sent to me and a notice in September or October of 1955. "Well," I said, "at that time I wasn't even at that address. So if it was sent then, I couldn't have received it, because I wasn't there." And he said, "Well, it's not a matter for me." He said, "You had better notify your draft board." And that is what I did.

Q. How did you notify your draft board?

A. I wrote them a letter, and I told them of my new address. I told them of the address at that

(Testimony of Carlin Constantine Venus.)

time, and then my new address was 756 Pier Avenue. And I informed them of that. That was in 1956.

Q. Did you leave a forwarding address when you left Modesto? A. No; I didn't. [55]

Q. Why didn't you leave a forwarding address?

A. Because the main people I was in contact with knew of my whereabouts. And, as far as the draft board was concerned, I knew they knew of my address. And when I moved, I notified the draft board of my new address.

Q. That is the card that you mailed to them?

A. Yes.

Q. Was there any other way that they knew of your address?

A. No. They might have been able to contact my parents' address, my parents' previous address, if they didn't have that address, of 1431-10th Street. They say that they sent the notice. Now, if the notice was sent to the Modesto address in 1955, October, 1955, they sent it to the wrong address, because I wasn't living at that address. I was living at 1120-30th Street, San Diego, as of February, 1955. Not only that, as you mentioned, the building wasn't even there.

Mr. Barwick: No. No. Just strike that as non-responsive, your Honor.

The Court: What do you want stricken?

Mr. Barwick: The last portion about the building not being there.

The Court: It may be stricken.

(Testimony of Carlin Constantine Venus.)

Q. (By Mr. Barwick): Directing your attention to April 25, 1957, did you go to the local draft board's office? A. Yes. [56]

Q. Was that the first time you went to the draft board after finding out that you had been reported delinquent? A. Yes.

Q. Why did you go to the draft board at that time?

A. Well, because of after writing back and forth—I wrote to the Board, and I told them of this, of my status, and so on. I thought that they would consider sending me another induction notice, because I didn't get it. I honestly felt that I deserved to get another notice. But because I didn't, I went to the draft board to review my file; because here the thing had already gone into other hands.

Q. How did you know that things had gone into other hands?

A. I had talked to an attorney about it.

Q. What other hands do you refer to?

A. Well, possibly the—I didn't know actually. Maybe the District Attorney or some—or the United States Attorney.

Q. You went to the draft board. Did you have a conversation on April 25 with Mrs. Haisch?

A. Yes; I did.

Q. And did you take anyone with you?

A. Yes; I did.

Q. And who did you take with you?

A. Bill McManis.

Q. Was he there at all times during your con-

(Testimony of Carlin Constantine Venus.)

conversation with Mrs. Haisch? [57] A. Yes.

Q. And did you go there for any specific purpose? A. Yes; I did.

Q. What was that purpose?

A. To copy the file.

Q. And did anyone tell you to copy the file?

A. A friend of mine did, yes.

Q. You had a conversation with Mrs. Haisch. Do you recall what you said and what Mrs. Haisch said during that conversation? A. Yes.

Q. Would you please repeat, as fully as you can remember, what was said during that conversation?

A. Well, I went into the office, and I was immediately shown in because of procedure there. And I asked to see my file, and she said that was all right. And I said I would like to have my friend copy my file with me, and she said, "Well, you will have to sign a statement allowing him to do so." And I said, "That is all right." So I went in, and he went in with me. We had two typewriters, and we tried to copy everything as of January, 1955, because of this, whatever it is termed. And then, from that time on Mrs. Haisch and myself, we were discussing, we were reviewing the file. And I asked her, I said, "Didn't you think it strange that I didn't report, since I have reported and been completely [58] co-operative for four or five years?" And she said, "Yes, I thought it very strange, because you have been very co-operative." And the conversation went on, and I referred to the letter that I had written speaking about my address in

(Testimony of Carlin Constantine Venus.)

San Diego. And she said, "Well, we didn't get the induction notice back, so we automatically figured that you got it. And so we went through with the proper procedure, because we assumed that you had gotten it." Now, she said, "Whether you got it or not we don't know, but we assume that you did." And I said, "Well, I did not get it, and it is certainly is, you know, quite a bit of difficulty that it is bringing up because of something that I am not even responsible for as far as it is actually a fact." And she mentioned, "Well, we usually file everything accurately and try to do our best." And I agreed with that. I wasn't trying to mention that she didn't mail it or anything. But as we discussed it, I said, "Well, what is the possibility of this, then?" And she mentioned, "Well, perhaps it is a postal mistake."

Q. Did you ask her at any time during that conversation, "What do I do now," or "Where do I stand," or did you ask her for any advice as to what you ought to do?

Mr. Duncan: I will object to that as leading.

The Court: It is leading. The objection is sustained.

Q. (By Mr. Barwick): Do you recall any further conversation at that time with Mrs. [59] Haisch?

A. We said many things, but I don't remember everything about it. I just remember the main highlights of it, naturally.

(Testimony of Carlin Constantine Venus.)

Q. Did she give you any advice?

Mr. Duncan: I will object to that as calling for a conclusion of the witness, your Honor. What was said is the thing in issue, not the——

The Court: The objection is sustained.

The Witness: What was said was that it is not in our hands anymore. And I said——

Q. (By Mr. Barwick): Who said that?

A. Mrs. Haisch.

Q. Was that in response to a question by you?

A. Yes.

Q. What was the question?

A. "Can I appeal this or anything now?" And she mentioned that it is not in their hands anymore, because it is in—either—I don't remember if she said District Attorney or United States Attorney. But she mentioned it was not in their jurisdiction anymore.

Q. Did she offer any solution?

Mr. Duncan: I will object to that, your Honor, as calling for a conclusion.

The Court: That objection is sustained and as to questions along that line. It has been established she hasn't the authority to give advice or offer solutions, and all. [60]

Mr. Barwick: That is a point, your Honor. She may not have had the authority, and she may have given it, and he relied on it.

The Court: I will sustain the objection.

Q. (By Mr. Barwick): Has anyone in any posi-

(Testimony of Carlin Constantine Venus.)

tion in the United States Government, to your knowledge, told you directly that you should report for induction? A. No.

Q. Has anyone in the United States Government prior to the indictment in this case told you or informed you that you might have a duty to report for induction even though you did not actually receive a notice?

Mr. Duncan: I will object to that as leading.

Mr. Barwick: It calls for a yes or no answer.

Mr. Duncan: It is direct examination, your Honor. We are not interested in counsel's testimony; we are interested in that of the witness.

The Court: Don't the regulations and laws require all these things without any specific notice? I am asking you now.

Mr. Barwick: Your Honor, it requires specific notice, but I want to——

The Court: I mean without additional formalities when a situation arises such as we have discussed here? Is there anything necessary other than the written forms that are sent out? [61]

Mr. Barwick: This question is asked in connection with his intent, your Honor, to show what his intent was. In other words, if someone had told him to go, even though it was wrong——

The Court: This doesn't depend on a verbal notice; it depends on a written notice.

Mr. Barwick: True, the——

The Court: And the records are on file. So what somebody else might have told him cannot be con-

(Testimony of Carlin Constantine Venus.)

sidered. We don't know who you mean by "any officer of the United States Government." If it is a question of knowledge or intent, he can testify what is in his mind on those matters. But I think when you go into a question of that kind, unless you show me that it is incumbent upon the government to give him verbal notice in addition to written notice——

Mr. Barwick: No, it is not.

The Court: ——then I would sustain the objection.

Q. (By Mr. Barwick): At all times during your selective service career, Mr. Venus, from the moment you first registered up to the present time, what has been your intent in connection with fulfilling any order received by you to report for induction?

Mr. Duncan: I will object to that as invading the province of the jury, your Honor. That goes to the ultimate issue in this case. That is a matter for the jury and not to be defined by the [62] witness.

The Court: It seems to me that he would have a right to——

Mr. Duncan: Well, the question is also leading, your Honor. I beg your pardon.

The Court: Go ahead.

Mr. Duncan: I think the question is leading, and it invades the province of the jury. Perhaps the same thing can be reached by a different type ques-

(Testimony of Carlin Constantine Venus.)

tion. But I think that question is clearly leading and invades the province of the jury.

The Court: After all, his intent is at issue here.

Mr. Duncan: It is the ultimate issue, your Honor, to be determined by the jury.

The Court: And, of course, the jury has a right to draw its own conclusions; but I think he would have the right to express himself in the light of his actions in this case.

Now, I would confine it to the matter at issue here instead of going into all his experiences, because, I don't know, it may relate back ten years or more.

Mr. Barwick: I did confine the question to Orders to Report for Induction, your Honor.

Mr. Duncan: I think the question can be more properly phrased, your Honor. It is vague and uncertain.

The Court: Reframe your question. [63]

Q. (By Mr. Barwick): Mr. Venus, have you formed any intent concerning what you would or wouldn't do if you received an order to report?

A. No.

Q. Did you have an intent if you got an order?

A. Yes; I would have reported if I——

Q. Did you have an intent? Yes or No?

A. To report?

Q. No; just did you have some thoughts on the subject? Would you do something when you got an order?

A. Yes.

Q. Now, what would you do if you got an order?

(Testimony of Carlin Constantine Venus.)

A. I would report.

Mr. Duncan: It is all hypothetical and speculative, your Honor.

The Court: The answer may stand. As I say, it is a province of the jury. After all, he is just a witness the same as any other witness. The jury will be instructed what the law is on that subject matter.

Q. (By Mr. Barwick): Has it ever been your intent to wilfully and knowingly fail to report if you received an order? A. No.

Q. Have you always stood ready to report for induction if you received a notice? [64]

A. Yes.

Q. Have you ever, in fact, reported for induction? A. Yes.

Q. When did you report for induction?

A. May, 1954.

Mr. Barwick: No further questions, your Honor, at this time.

The Court: We will take a recess at this time. Again, I remind you of the admonition, ladies and gentlemen, you will please observe. We will recess for fifteen minutes.

(Recess taken.)

The Court: Do you stipulate the jurors and the defendant are present?

Mr. Barwick: It is so stipulated.

Mr. Duncan: It is so stipulated.

The Court: I don't see the defendant.

Mr. Barwick: He is on the stand.

(Testimony of Carlin Constantine Venus.)

Mr. Duncan: He is on the stand, your Honor.

The Court: Oh, there he is. I didn't look in that direction. Go right ahead.

Cross-Examination

By Mr. Duncan:

Q. Mr. Venus, you testified that in February, I believe of 1955, you notified the draft board here of your address being 1120-30th Street in San Diego; is that correct? [65] A. Yes, sir.

Q. What means did you use to notify the draft board of that?

A. I mailed them a post card.

Q. And that post card was mailed where?

A. It was mailed from a Los Angeles post office.

Q. Did you send it by registered mail?

A. No; I didn't.

Q. You said that somebody else was with you, however, when you mailed it; is that correct?

A. Yes.

Q. You also, on June 7, I believe, 1954, sent a change of address to the draft board giving them the Modesto address, didn't you? A. Yes.

Q. By what means did you send that address?

A. Sent it by means of a letter.

Q. And where did you mail that?

A. I mailed that from Modesto.

Q. And you sent that one by registered mail, didn't you?

A. I am not sure. I don't remember if I did or not.

(Testimony of Carlin Constantine Venus.)

Q. I will ask you to look through the exhibit here, Government's Exhibit 1, and see if you can find that letter that you wrote and dated June 7, 1954.

Can you find that? [66] A. Yes.

Q. Didn't you ask for a return receipt for registered mail when you sent that change of address?

A. Yes; I guess I did on this one.

Q. The envelope is attached, isn't it?

A. Yes.

Q. You also sent the draft board, did you not, a change of address in September of 1956?

The Court: Are all those exhibits numbered?

Mr. Duncan: They are all in Exhibit Number 1, your Honor.

The Court: I know, but are the pages separately numbered?

Mr. Duncan: Your Honor, there are about three numbers on each one of those pages.

The Court: I am just wondering if any of these exhibits that you take out now have any particular place in that file?

Mr. Barwick: Yes; they do, your Honor. If the Court please, each exhibit is numbered either in ink or pencil from 1——

The Court: I think they ought to be kept in order. You had better take this file and hand him the exhibits as you want him to identify them.

Mr. Duncan: All right, your Honor. [67]

The Court: That one you took out you put on top there, did you?

(Testimony of Carlin Constantine Venus.)

The Witness: Yes, sir.

Mr. Duncan: I would like to have Mrs. Haisch assist me here, if I may, your Honor, at the counsel table. Is that all right?

The Court: Yes; do that.

Mr. Duncan: Will you come forward, Mrs. Haisch?

The Court: I notice that you have copies, so that we can keep all these copies and everything in order, the original file in conformity with the copies.

Mr. Duncan: It is a letter dated September 4, I believe, Mrs. Haisch?

Mrs. Haisch: Yes.

Q. (By Mr. Duncan): And I show you now, Mr. Venus, a letter dated September 4, purporting to bear your signature as well as the envelope that is attached thereto. Now, that was sent certified mail with return receipt requested, was it not?

A. Yes.

Q. In other words, in June of 1954, you requested a return receipt and again in September of 1956, you requested a return receipt, but there was no return receipt requested in February of 1955; is that right? A. That is right. [68]

Q. Can you explain that?

A. Yes. I had no need to. As far as I was concerned, I was just dropping the draft board a line to let them know of my new address. It was only about a short ways away from one address to the other, from the previous San Diego address to the new San Diego address.

(Testimony of Carlin Constantine Venus.)

Q. Why is it in June of 1954, and again in September of 1956, you requested a return receipt?

A. At that time I had reported for induction, May, 1954, and then I noticed that the possibility of, or the necessity of, getting a return receipt for the address. Then, I, on the other one, I did the same thing. But on the one in February, 1955, I didn't have to. I mean, I didn't feel that it was necessary for me to do so.

Q. You thought it was necessary in June of 1954, and you thought it was necessary in September of 1956, but it wasn't necessary in February of 1955?

A. Well, that is the—I didn't—I wasn't—that didn't cross my mind at that time.

Q. You are aware of the fact, are you not, Mr. Venus, that the draft board file does not contain the change of address that was sent in February of 1955, are you not?

A. Yes.

The Court: You may be seated. You can sit down.

Mrs. Haisch: Thank you. [69]

Q. (By Mr. Duncan): Mr. Venus, you said that you reported for induction in May of 1954. Were you inducted?

A. No; I wasn't.

Q. Why not?

A. Because I am an ordained minister, and I refused induction openly.

Q. In 1954?

A. Yes.

Q. And then, in June of 1954, after that, you sent a change of address to the draft board and

(Testimony of Carlin Constantine Venus.)

requested a return receipt, right? A. Yes.

Q. When were you first aware of the fact, Mr. Venus, that you had been ordered to report for induction on November 8 of 1955?

A. First time I heard of it was when the F. B. I. agent contacted me. I had not heard of it before that time.

Q. And that was in April of 1956, was it not?

A. Approximately, yes.

Q. And you knew at that time that you had been ordered to report for induction, did you not?

A. Yes, but the agent notified me to inform the draft board.

Q. Have you at any time since the day of November 8, 1955, presented yourself for induction at an induction station? [70]

Mr. Barwick: Objection, your Honor.

The Witness: No.

Mr. Barwick: It is irrelevant, and immaterial whether——

Mr. Duncan: That is the issue in the case, your Honor.

The Court: The objection is overruled.

Q. (By Mr. Duncan): You may answer the question. A. No.

Q. So you were advised then in April of 1956, that you had been ordered to report for induction.

When is the next time you went into your draft board?

A. Well, I wrote the draft board right away, and I thought that, because I didn't receive any

(Testimony of Carlin Constantine Venus.)

induction notice, that they would send me another induction notice, if anything, and then I could appeal that. Or I didn't even receive a 1-A Classification, let alone an induction notice. But after not hearing from the board—I had written them, and then I had gotten a letter from another office. It might have been the United States Attorney or District Attorney, I am not sure, and it said there is a certain matter of delinquency of you not reporting the address, and so on.

Q. Just answer the question. Now, Mr. Venus, you found out you had been inducted in November. You found that out in April of 1956?

A. Yes. [71]

Q. The next time you went to your draft board was a year later, in April, 1957, wasn't it?

A. According to instructions that the F. B. I. agent gave me, that is right.

Q. He told you to go to your draft board a year later?

A. He told me to write to the draft board, and that is what I did.

Q. When did you write that letter?

A. I wrote it in April of 1956. It was right after he talked to me.

Q. You did appear, did you not, in April of 1957 at the local board, didn't you? A. Yes.

Q. And at that time you went entirely through your selective service file, didn't you? A. Yes.

Q. And Mrs. Haisch pointed out to you the Order to Report for Induction, did she not?

(Testimony of Carlin Constantine Venus.)

A. Yes.

Q. And at that time you saw that Order to Report for Induction, did you not?

A. Yes, but I didn't know that I was supposed to. I didn't know that was the procedure.

Q. This notice, change of address, Mr. Venus, that you sent in February of 1955, you sent that from Los Angeles, [72] I believe you said?

A. Yes.

Q. And you said that somebody was with you when you mailed it? A. Yes.

Q. Did he go with you to the mail box?

A. He was there in the post office, and I believe he saw me mail it.

Q. Did you have him read it? A. No.

Q. And he doesn't know for sure what you sent, does he? A. I don't know exactly.

Q. You didn't have him read this post card you sent to the draft board?

A. No. No; because at that time it wasn't in issue like it is now.

Q. To your knowledge, you are the only one that has ever seen this post card with the change of address that you sent in 1955?

A. Would you repeat the question, please?

Q. To your knowledge then, you are the only one that has ever seen this post card that you sent to the draft board in February of 1955?

A. No; I would not say I am the only one that has seen the post card. I might say I am the—— [73]

Q. Well, the completed post card.

(Testimony of Carlin Constantine Venus.)

Now, you have said, Mr. Venus, that at some time you had talked to an attorney. When was that?

A. I called him on the phone, an attorney, and asked him about the F. B. I., told him about the F. B. I.

Q. I didn't ask you that. I asked you when it was, Mr. Venus?

A. When?

Q. Yes.

A. It was right at the moment that the F. B. I. agent talked to me, right after that.

Q. Was it an attorney in Los Angeles?

A. Yes.

Q. Or one down here?

A. Yes. His name was Berlin.

Q. Mr. Berlin there in Beverly Hills?

A. Yes.

Q. Did you just talk to him on the telephone?

A. Yes.

Q. That was in April of 1956 that you talked to an attorney?

A. (No audible response.)

Q. Now, this building in Modesto, this 1431-10th Street, you say that is a gymnasium?

A. Yes; it was. [74]

Q. You worked there?

A. Yes; I did.

Q. What kind of work did you do there?

A. Physical instructing and massage.

Q. You say the building is no longer there?

A. That is what I recently learned, yes.

Q. But the last time you were in Modesto it was there, wasn't it?

A. Yes.

(Testimony of Carlin Constantine Venus.)

Q. And when was that?

A. February, 1955.

Q. February, 1955?

A. Yes. I had gone back either January or February; I am not exactly——

Q. The building was standing at that time?

A. Yes.

Q. And you are sure that the address there was 1431-10th Street? A. Yes.

Q. I want to get this clear now, Mr. Venus; you didn't learn that you had been ordered for induction until April of 1956?

A. Yes; I believe that is right. I am not sure day to day, but it was a long time after they had said they sent the induction notice, that the F. B. I. agent contacted me. [75]

Q. You don't remember the name of the F. B. I. agent that contacted you? A. No; I don't.

Q. It wasn't Bill Scruggs? A. Pardon?

Q. Bill Scruggs?

A. Scruggs. I am not sure.

The Court: Can you describe the man, how he looked, what he looked like?

The Witness: He was a pleasant-looking man. He was about six foot, I would say; weighed about 190 pounds, maybe 185.

Q. (By Mr. Duncan): A ruddy complexioned man? Mr. Sayers, by any chance?

A. I can't—well, his face was—he had a fair complexion. He didn't have a ruddy complexion, the man that I talked to.

(Testimony of Carlin Constantine Venus.)

Mr. Duncan: I have nothing further.

Mr. Barwick: I have a couple of questions, your Honor.

The Court: Yes.

Redirect Examination

By Mr. Barwick:

Q. This conversation that you had with an attorney in Beverly Hills in April of 1956—— [76]

A. Yes.

Q. ——who was present during that conversation? A. Myself.

Q. Or was it over the telephone? A. Me.

Q. On the telephone or in his office?

A. I was on the telephone.

Q. And what did you ask him?

A. I just—he had been working for a previous attorney that I had hired, and the other attorney had retired; so he was there in the office. I asked him what should I do about this induction they say they sent, that the draft board said they had sent me? I told him about myself notifying the Board, and so on; and he said, well, as far as he knows, he said, the best thing to do is to check your file and see what actually has gone on and go from there. He didn't give me, tell me what to do and, actually, what not to do. He gave me suggestions, and so I went on from there.

Q. And did you write the draft board immediately thereafter? A. Pardon?

(Testimony of Carlin Constantine Venus.)

Q. Did you write the draft board immediately thereafter? A. Yes.

Mr. Barwick: Is the file there?

Mr. Duncan: I have it here, your Honor. [77]

Mr. Barwick: Actually, that copy is good enough.

Q. Directing your attention to Item Number 32 in your draft file, is that the letter that you wrote to your draft board after talking to the F. B. I. agent?

A. Yes.

May I say something else?

The Court: You have answered the question.

Q. (By Mr. Barwick): Did you receive a reply to that letter?

A. No; I didn't get a direct reply from the draft board.

Mr. Barwick: If the Court please, could I confer with the other counsel before I ask my next question?

The Court: Surely.

Mr. Barwick: John, would you come over here a minute?

(Off the record discussion between counsel.)

Q. (By Mr. Barwick): When you received no further direct response to your letter, did you write the draft board again? A. Yes; I did.

Q. And when is the next time you wrote them?

A. I believe it is September, 1956.

Q. After the alleged notice to report was sent, did you ever lose your draft card? A. Yes.

(Testimony of Carlin Constantine Venus.)

Q. Did you write the Board for another [78] card? A. Yes.

Q. Did they send it to you? A. Yes.

Mr. Duncan: The cross-examination is being exceeded now, your Honor. I assume that this is redirect?

Mr. Barwick: It is redirect.

The Court: All right. Go ahead.

Q. (By Mr. Barwick): Did your Board inform you by mail at any time after you talked to the F. B. I. agent about reporting for induction?

Mr. Duncan: That calls for a conclusion of the witness, I believe, your Honor. I think the file is going to have to speak for itself.

The Court: You are inquiring about a notice, whether he received a notice?

Mr. Barwick: Yes; whether he received the notice from the Board in writing after the original notice.

The Court: Assuming that a notice was sent. Is that what you are driving at?

Mr. Barwick: I am not assuming anything. I am just asking him if he ever got one.

The Court: Any communication?

Mr. Barwick: Any communication relative——

The Court: You may ask that question.

Q. (By Mr. Barwick): Did you receive any communication [79] after this first order was supposed to have been sent? A. No.

Q. To the best of your knowledge, did the draft

(Testimony of Carlin Constantine Venus.)

board try to reach you at your local San Diego residence that you mentioned in your letter?

A. No.

Mr. Duncan: I will object to the manner in which that question is phrased, your Honor. I think it could be asked: Did he receive any mail from them, without——

The Court: The objection is sustained.

How would he know if the draft board ever tried to reach him?

Mr. Barwick: That is what we want to find out, your Honor, if he does know.

The Court: How would he know that they tried to reach him? He said he had no communication from the draft board.

Mr. Barwick: I am talking about any type of communication to his home. They could pick up a phone and call him. I want to know if that took place.

The Court: Ask your question over again that you have in mind.

Q. (By Mr. Barwick): Did the draft board at any time subsequent to October 28, 1955, to your own knowledge, contact you at your San Diego address? [80] A. No.

Q. You ordinarily receive phone calls at that San Diego address? A. Yes.

Q. At that time? A. Yes.

Q. Did you receive other correspondence at that address? A. Yes.

(Testimony of Carlin Constantine Venus.)

Q. And you had no communication from the draft board?

The Court: Just a moment. You are continuing with that course of examination. Is it on the theory that there was some obligation on the part of the draft board to communicate with the witness?

Mr. Barwick: Yes; there is, your Honor. There is, your Honor. Under the regulations the draft board has a duty, if they have any other way of finding a delinquent, to pursue it and notify the delinquent.

The Court: Let's see that regulation.

Mr. Barwick: I don't have a complete copy of the regulations. I can give you the number.

The Court: Let's see it.

Mr. Barwick: Regulation 1642.41, sub (a) and sub (b), and——

The Court: 1642. What else?

Mr. Barwick: .41. [81]

The Court: .41.

Mr. Barwick: Sub (a) and (b).

The Court: Sub (a) and (b).

Mr. Barwick: And I believe there are a couple more right next to it, but I didn't write down all the rest of the citations.

The Court: These regulations impose a duty of some kind on the draft board?

Mr. Barwick: Yes.

The Court: Let's see the regulation.

Mr. Barwick: I don't have the regulations in

(Testimony of Carlin Constantine Venus.)

writing, your Honor. Mr. Duncan has a complete copy of the regulations in his office.

Mr. Duncan: I think it is a matter of proper instruction, your Honor. I intend to submit instructions predicated upon regulations. It is 32 CFR, incidentally.

The Court: The counsel has asked the question assuming the state of fact to exist. Now, I don't know. You have objected to the question, haven't you? Or have you?

Mr. Duncan: I don't believe I had interposed an objection to that particular question, your Honor. I would like it restated or read back.

The Court: You would like what?

Mr. Duncan: I would like it read back, if the Court please. [82]

The Court: You want the question read back?

Mr. Duncan: Yes, please.

The Court: Let's have the question.

(The question beginning and ending on Line 9, Page 81, was read by the reporter.)

The Court: I think he already answered that before; he had no communication whatsoever.

Mr. Barwick: Yes; that was when you asked whether——

The Court: He had answered that then?

Mr. Barwick: Yes.

The Court: Then I asked you if there was some regulation requiring it?

Mr. Barwick: Right.

(Testimony of Carlin Constantine Venus.)

The Court: Then that is nothing for him to answer?

Mr. Barwick: No.

The Court: That is a legal matter that I want to look into.

Mr. Barwick: No further questions.

Recross-Examination

By Mr. Duncan:

Q. Mr. Venus, I show you a letter dated April 9, 1956, and purporting to bear your signature. Is that the letter you wrote to the draft board after the F. B. I. agent contacted you? A. Yes.

Q. This is the only one you wrote after the [83] F. B. I. agent contacted you?

A. I think this is the first one I wrote.

Q. And would you look at the envelope on that letter, please? A. Yes.

Q. How was that sent?

A. That is Special Delivery, and it is air mail. This is——

Q. You also wrote a letter?

The Court: Just a moment. You asked him a question, didn't you?

Mr. Duncan: I beg your pardon.

The Court: I didn't hear the answer.

The Witness: I said yes, this was the letter; and he asked me if it was——

The Court: A little louder, please.

The Witness: He asked me how it was stamped,

(Testimony of Carlin Constantine Venus.)

and I said it was marked "Special Delivery" and "Air Mail." This was after I had moved to Santa Monica, California.

Q. (By Mr. Duncan): You, on November 14 of 1956, also advised the draft board, did you not, of a change of address? A. November 14, 1956?

Q. Yes. I will show you this letter. Perhaps it will refresh your memory. This is just a copy.

A. Yes; that is right. I was thinking in the past.

Q. And this is the envelope here, or a copy of the [84] envelope, in which the letter was sent?

A. I believe it is, yes.

Q. That is sent by certified mail, is it not?

A. Yes. I will tell you why, if you would like to know.

Q. Let's see. That is November of 1956, September of 1956, and June of 1954, you used certified or registered mail to send in a change of address; is that right? A. Yes.

Q. But not in February of 1955?

A. That is right, because there are about five other cards in there to the same effect. They were not registered, or even possibly ten.

Q. Mr. Venus, I have no objection if you want to show us those that were sent by some other method than registered mail.

A. Well, they are in the file, I believe, in the——

Q. How many of them are there, would you say?

A. I would say there are about five. There are probably five cards similar to the one I sent, either notifying the Board I was going to be at a new

(Testimony of Carlin Constantine Venus.)

address, or something to that effect, anything in connection with procedures, because I never tried to run away from anything.

Mr. Duncan: That is all. I have nothing more.

Mr. Barwick: No further questions, your Honor.

The Court: Is that all?

Mr. Barwick: That is all.

The Court: Is that all? [85]

The Witness: Would you like these?

Mr. Barwick: Yes; they belong in the file.

Mr. Duncan: I beg your pardon, your Honor, I would like to ask the defendant one further question, if I may. I am sorry.

Q. You were represented, were you not, Mr. Venus, by an attorney in 1954, on a selective service matter? A. Yes.

Q. Who was that attorney?

A. Harold Shircliffe. Los Angeles.

Q. And it was a case similar to this one, but on a different transaction; is that correct?

A. Not similar to this one.

Q. It involved, shall we say, the selective service laws? A. Yes.

Q. And that man represented you for how long a period?

A. I am not sure. From 1954, I believe, in December, January, 1955; somewhere around that area, around that time.

Q. He represented you then for two or three months? Were you in contact with him?

A. Well, up to the time of August, 1955, when

(Testimony of Carlin Constantine Venus.)

the Supreme Court ruled that the case would be thrown out of court.

Q. Then you were in contact with this attorney for a [86] period of six months and in the early part of 1955? A. Yes.

Q. And had the advice of an attorney then during the early part of 1955? A. Yes.

Q. That is the same time you sent this post card in advising them of a change of address?

A. Yes, but this other case was pending at that time, and then it was won in August.

Mr. Duncan: That is all, your Honor. Thank you.

Mr. Barwick: I believe I will have the witness go back on the stand, your Honor, and ask him some further questions.

Redirect Examination

By Mr. Barwick:

Q. How long have you been sending mail registered to your draft board?

The Court: Doesn't the record show it, what he said?

Mr. Barwick: It probably does, your Honor, but it is going to take me longer to dig through it or have the jury dig through it than to ask him. If I can get the question, and he can answer it, it will save time. I can spend the time digging it through and asking him if he did it, but the jury can spend an hour——

(Testimony of Carlin Constantine Venus.)

The Court: I mean, within what period of time did he—— [87]

Mr. Barwick: I wanted to know when he first started sending registered mail to the draft board, if he recalls.

Mr. Duncan: The file will speak for that, your Honor.

The Court: You have a file of the file. The file is in evidence, the entire file. You can comment and have occasion to refer to that.

Mr. Barwick: All right, your Honor. No further questions.

(Witness withdrew.)

Mr. Barwick: Mr. Beil.

The Clerk: Will you be sworn?

EDWIN BEIL

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please. State your name.

The Witness: Edwin Beil.

The Clerk: The first name is spelled how?

The Witness: E-d-w-i-n.

The Clerk: The last name is spelled how?

The Witness: B-e-i-l.

The Clerk: B-e-i-l?

The Witness: That is right.

(Testimony of Edwin Beil.)

Direct Examination

By Mr. Barwick:

Q. Mr. Beil, directing your attention to February, 1955, [88] you recall that particular month of 1955? A. Yes; I do.

Q. Some time during that month did you have a conversation with the defendant concerning the mailing of a card? A. Yes.

Q. Where did this conversation take place?

A. In Los Angeles.

Q. Where in Los Angeles?

A. We were living together near Sixth and Alvarado. We were staying there temporarily while we were doing a job there.

Q. And whereabouts did the conversation concerning the card actually take place? In what building, or was it on the street?

A. Well, along the street on the way to the post office.

Q. Were you going to the post office to mail any letters? A. No.

Q. You were just accompanying the defendant?

A. That is right.

Q. Was anyone else present? A. No.

Q. Would you please repeat to the Court and the jury, to the best of your recollection, what was said during that stroll to the post office? [89]

A. Well, we were discussing various things, but

(Testimony of Edwin Beil.)

he wanted to mail the draft board a card, because he thought he might be——

Mr. Duncan: I object to the manner in which the witness is testifying, your Honor. He has got to give the conversation, what was said.

The Court: Answer the question if you can.

The Witness: I don't remember word for word what was said.

Q. (By Mr. Barwick): To the best of your recollection; that is all we want. Just your best recollection. What you said, how he answered, then what you said relative to this card.

The Court: Relative to what card? He wasn't on the witness stand before; he was just put on. Now, you are calling his attention to some particular card?

Mr. Barwick: Yes; if there was a card. That is what I want to find out, what they talked about.

The Court: Lay your foundation. Go ahead.

Q. (By Mr. Barwick): You had this conversation going along the street, is that correct?

A. That is right.

Q. And you were discussing various subjects?

The Court: And he is your witness. Don't lead your witness. [90]

Q. (By Mr. Barwick): Did you discuss a card?

A. Yes; we did.

Q. Would you please tell the Court and the jury what you said relative to this card, if anything?

A. I asked him why he was sending it, and he told me that——

(Testimony of Edwin Beil.)

Mr. Duncan: I will object to any statement made by the defendant as self-serving and hearsay, your Honor. The defendant, himself, has testified, and he was perfectly capable of testifying for himself what the situation was.

The Court: I take it you want to develop whether he saw a card being mailed or something?

Mr. Barwick: That is correct, your Honor.

The Court: If such a conversation between the defendant and this witness, is that relevant?

Mr. Barwick: I believe it would become, your Honor, to corroborate the fact that the defendant testified that he actually mailed the card addressed to the Board. If another witness can say, "Yes, we discussed the card," the likelihood is there was such a card. It is all weight to the fact that the defendant mailed the card addressed to the Board, the fact they talked about it.

The Court: We haven't identified any card.

Mr. Barwick: No, your Honor.

The Court: Any particular card. You haven't identified any. [91]

Mr. Barwick: No.

The Court: Or any address on the card or to whom it was directed.

Mr. Barwick: I haven't asked him that yet.

The Court: If he saw a card and he identifies the card, he may state what he observed.

Mr. Barwick: That is true, your Honor, but this witness didn't look at the card that closely, so I can't ask him that. If I could, I would have. He

(Testimony of Edwin Beil.)

didn't see the address on the card. The only thing he knows about the card is if a conversation took place.

Mr. Duncan: I will object to the evidence then, your Honor, as being too remote. Now, the witness could have been with the defendant on a dozen occasions when cards were mailed, and it is awfully remote as to the particular card in question. If the witness didn't see the card, he is not the proper witness to testify.

The Court: The witness may testify as to what he knows from observation.

Mr. Barwick: All right. I will frame the questions in that light.

Q. Did you see the defendant carrying a postal card? A. Yes; I did.

Q. Did you see what was on the card?

A. Not all of it. [92]

Q. Did you see any of it? Was there any writing on it? A. Yes; it was.

Q. Could you make out the writing as to what it said? A. I couldn't make out the address.

Q. Could you make out any words on the card?

A. No.

Q. Did you see the defendant mail this card?

A. Yes; I did.

Q. Did he put it in the U. S. mail box?

A. Yes.

Q. In what post office station?

A. In a substation in Los Angeles.

Q. Where?

A. Sixth and Alvarado Streets.

(Testimony of Edwin Beil.)

Q. Was the card stamped?

A. Yes; it was a government post card already stamped.

Q. You saw that? A. Yes; I saw that.

Mr. Barwick: No further questions.

Cross-Examination

By Mr. Duncan:

Q. Do you remember when this card was mailed, Mr. Beil?

A. I remember it was in February. I don't know the date.

Q. February of 1955? [93]

A. That is right.

Q. Have you ever been with the defendant before when he mailed things? A. Yes.

Q. In February of 1955?

A. In the month of February?

Q. As a matter of fact, you can't say you can, isn't that it?

A. I have been with him before, and I remember that particular card because he told me what it was for.

Q. Did you see the card?

A. Yes; I saw the card.

Q. You did? A. Yes.

Q. What did it say? A. I didn't read it.

Q. It was a post card?

A. I took his word for what was on it.

Q. It was a post card?

(Testimony of Edwin Beil.)

A. It was a post card, yes.

Q. You didn't see to whom it was sent?

A. No. I took his word for where it was sent.

Q. Was it unusual for you to go with the defendant to mail a card?

A. No. We were working together. [94]

Q. As a matter of fact, what happened, the two of you were just together when he dropped a post card in the mail box, wasn't that it?

A. We were together most of the time during that period of time.

Q. And this particular card you are talking about, the two of you just happened to be together when he dropped a post card in the mail box; isn't that right?

A. No; we made a special trip to the post office at that time, that particular time.

Q. But you had done that before, hadn't you?

A. I suppose.

Q. Had you?

A. I don't remember any other mail that important that he sent.

Q. Why do you specifically remember this one?

A. Because he told me why he was sending it, and I thought that was pretty important.

Q. When did he tell you that?

A. On the way to the post office.

Q. You might as well tell us. What did he tell you?

A. He said that he had to mail a card to his draft board to give them his parents' address to

(Testimony of Edwin Beil.)

make sure they had a permanent address, because we were working different places.

Q. How do you happen to remember? That was two and a half [95] years ago, wasn't it?

A. I was living with him, and I thought that his draft classification and his relations with the draft board were more important than most letters are.

Q. But you remember specifically now that two and a half years ago you went to a mail box with him, and he told you, "I have got to mail in a change of address to my draft board"; is that right?

A. Yes; I do.

Q. Do you remember other occasions going with him to the mail box?

A. There is a lot of difference between mailing personal letters and keeping in contact.

Q. I am asking you if there are other occasions?

A. Yes.

Q. Do you remember what he mailed on the other occasions?

A. Yes. I have seen on certain occasions I remember being with him when he has mailed letters to his parents or to his cousin.

Mr. Duncan: I have nothing further.

Mr. Barwick: No further questions.

The Court: That is all.

(Witness withdrew.)

The Court: I think we will suspend at this time. We will have a recess until tomorrow at 9:45. [96]

Ladies and gentlemen, please keep in mind the

admonition heretofore given: Not to discuss this case with anyone or to permit anyone to discuss this case with you or within your presence, or to form or express any opinion as to the guilt or innocence of the defendant until the case is finally submitted to you.

Recess until 9:45 tomorrow morning.

(Whereupon, at 4:30 o'clock p.m. the court recessed until 9:45 o'clock a.m., Thursday, November 14, 1957.) [97]

Thursday, November 14, 1957—9:45 A.M.

The Clerk: The case on trial, your Honor, United States versus Venus.

The Court: Do you stipulate the jurors and the defendant are now present?

Mr. Duncan: It is so stipulated, your Honor.

Mr. Barwick: I so stipulate, your Honor.

The Court: You may proceed.

Mr. Barwick: At this time I would like to call Mr. McManis.

The Court: Let's see. Wasn't there someone on the stand at the time we adjourned still under examination?

Mr. Barwick: No, your Honor.

The Court: Mr. Beil.

Mr. Barwick: Mr. Beil was through.

The Court: Was he? All right.

The Clerk: Will you be sworn?

WILLIAM McMANIS

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you be seated, please, and state your name?

The Witness: William McManis.

The Clerk: The last name is spelled how? [98]

The Witness: M-c-M-a-n-i-s.

Direct Examination

By Mr. Barwick:

Q. Mr. McManis, directing your attention to the period of time early in 1955, where were you living at that time? A. Modesto, California.

Q. Were you acquainted with an address known as 1431-10th Street in Modesto?

A. Yes; I was.

Q. Had you ever been at that address?

A. Yes. I had previously worked at that address, the gymnasium.

Q. In any time during the early part of 1955, did you have occasion to go back to 1431-10th Street?

A. Yes; I did.

Q. On what occasion?

A. My wife was working at the California State Employment Office, which was located near that address, and, as we traveled to and from work from our home, we would pass by that address.

Q. Did you observe any unusual activity taking place at 1431-10th Street in Modesto when you drove by? A. Yes; I did.

(Testimony of William McManis.)

The Court: Why don't you fix some dates here, so we know exactly what dates you are talking about? [99]

Q. (By Mr. Barwick): When did this activity take place?

A. It was after the first of March, 1955.

Q. And how long did this activity continue, to the best of your knowledge?

A. Up until the latter part of April, 1955.

Q. And what was the nature of the activity at that address?

A. The building was being wrecked and moved from that address.

Q. And when was it completely removed?

A. In the latter part of April. To be specific, April the 20th, 1955.

Q. Was another building put in its place?

A. Not to my knowledge.

Q. To the best of your knowledge, what was at that address after the building was removed?

A. It was a used car lot right next door, and they had taken over that property, and it was used for parking of cars.

Q. To the best of your knowledge, was any other building put on that location up until October, 1955?

A. Well, up until May the 22nd of 1955, when I left Modesto, no building was on that lot.

Mr. Barwick: I have no further questions.

Mr. Duncan: I have no questions.

The Court: That is all.

(Witness withdrew.) [100]

Mr. Barwick: The defense rests, your Honor.

The Court: Any rebuttal?

Mr. Duncan: The government rests, your Honor.

Mr. Barwick: If the Court please, I would like to approach the bench for the purpose of discussing a motion.

The Court: I am going to excuse the jury at this time. We still have to go over the instructions, and that may take a little while. I am going to excuse the jury now for another recess.

Please keep in mind the admonition.

(Whereupon, the jury retired to the jury room, and the following proceedings were held outside the presence and hearing of the jury.)

Mr. Barwick: Mr. Clerk, would you be so kind as to hand this to the judge?

At this time, your Honor, I would like to make a motion for judgment of acquittal on the following grounds:

(1) There is no evidence to show that the defendant is guilty as charged in the indictment;

(2) The government has wholly failed to prove a violation of the Act and regulations by the defendant as charged in the indictment;

(3) The undisputed evidence shows that the defendant is not guilty as charged;

(4) The Universal Military Training and Service Act [101] as construed and applied by the regulations thereunder, and more particularly, Section 1641.3 of the Selective Service Regulations is unconstitutional, because it has deprived the defend-

ant of due process of law, contrary to the Fifth Amendment of the United States Constitution;

(5) Section 1641.3 of the Selective Service Regulations deprive the defendant of procedural due process of law at the trial, because it denied the defendant of his right to a full and fair hearing upon the question of whether he actually received the notice requiring him to report for induction;

(6) The Universal Military Training and Service Act as construed and applied by the regulations thereunder and, more particularly, Section 1642.2 of the Selective Service Regulations is unconstitutional, because it deprived the defendant of due process of law, contrary to the Fifth Amendment of the United States Constitution;

(7) Section 1642.2 of the Selective Service Regulations deprive the defendant of procedural due process of law at the trial, because it denied the defendant of his right to a full and fair hearing on the question of whether he actually received the notice requiring him to report for induction.

The Court: You read to me the sections that you have quoted.

Mr. Barwick: I don't have a copy. [102]

The Court: You should have. If you are going to quote statutes, you should be able to produce them.

Mr. Duncan: I will produce one, your HONOR, that counsel can use.

The Court: In other words, your motion is purely on statutory or regulation provisions, and they are not particularly concerned with the evidence in this case.

You haven't made any point as to the insufficiency of the evidence, or anything of that kind.

Mr. Barwick: I hope to argue that more fully in just a moment as to where the evidence is insufficient.

The Court: I haven't noted it in your stating of your motion that you have alluded to the evidence in any way. You just merely talked about the law as it now stands in relation to these matters or the regulations without——

Mr. Barwick: I intend to amplify the statement as to insufficiency of the evidence.

The Court: All right.

Mr. Barwick: If the Court please, Regulation 1641.3 of the Selective Service Regulation reads, as follows:

“Communication by Mail. It shall be the duty of each registrant to keep his local board advised at all times * * *”

The Court: Do what? To do what there?

Mr. Barwick: “* * * to keep his local board advised”—— [103]

The Court: Yes.

Mr. Barwick: ——“at all times of the address where mail will reach him. The mail of any order, notice or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not.”

Now, under this regulation, your Honor, a man could never receive notice in any form, not know a

thing about it, and he would have notice. If that doesn't deprive a man of a constitutional right to notice——

The Court: Isn't there a jury here to determine whether or not he was notified? That is the factual matter that was discussed in the trial of the case, wasn't it?

Mr. Barwick: But, according to the regulation——

The Court: Do you have witnesses?

Mr. Barwick: According to this regulation, it doesn't make any difference. He is guilty whether he——

The Court: Then, what is the purpose of putting on witnesses?

Mr. Barwick: Pardon?

The Court: What was the purpose of putting on witnesses?

Mr. Barwick: Because we hoped to show that he actually didn't receive it. And, in addition, we hoped to show that this particular regulation is unconstitutional, and that [104] it should be amended. Because, if there is a conviction in this case, it will certainly be appealed on the basis of this regulation.

The Court: Is there any decision construing the matter?

Mr. Barwick: No. That regulation has never been construed, to the best of my knowledge.

Mr. Duncan: May I be heard on that problem?

The Court: When we get to it. Just a moment now. What else do you have?

Mr. Barwick: Now, the next, 1642.2.

The Court: We are not here, I don't believe, construing the statute there. You are urging that the Acts are unconstitutional?

Mr. Barwick: I am, your Honor. I am urging that these particular regulations are unconstitutional, the ones that I have cited, and they are applied in this case. They have to be; otherwise, the government doesn't have a case if they don't apply these regulations in the way they are applied. We feel these two particular ones are unconstitutional.

The Court: It is a factual situation in this particular case. You have spent practically all your time, that is, both sides, in establishing whether or not notice was given as required by the statute.

Mr. Barwick: That is true. But just because we have [105] got the evidence in that doesn't mean that the jury has to believe it in light on the regulation. The jury may come to the conclusion, "Well, they don't have to pay any attention to whether he got it or not. Under the regulation he is guilty, and that is the regulation."

The Court: All right. Go ahead.

Mr. Barwick: "1642.2. Duty. When it becomes a duty of a registrant or other person to perform an act or furnish information to a local board or other office or agency of the selective service system, the duty or obligation shall be a continuing duty or obligation from day to day; and failure to properly perform the act or supplying of incorrect or false information shall, in no way, operate as a waiver of that continuing duty."

Taking this section in conjunction with the other

section, the two constitute an impossible situation for a defendant.

The Court: Hasn't that matter been determined in the case we discussed yesterday?

Mr. Barwick: It has been determined in the Eighth Circuit, but that isn't the Ninth Circuit. And the Eighth Circuit can still be wrong, and we can still urge the grounds that it is unconstitutional. In that particular case, the grounds were not urged.

The Court: In that case, apparently, [106] nobody——

Mr. Barwick: Nobody urged the constitutionality of the section, according to my reading of the case.

The Court: But the case could have been taken up to the Supreme Court, but nothing was done about that, was it? And it is law so far as we know it now, isn't it?

Mr. Barwick: The law insofar as that particular Circuit, says that if you have an indictment that charges a man with failure to report on one date, you can convict him of failure to report thereafter. The Circuit did not rule on the constitutionality of the provision. Maybe it was never around in the trial court.

The Court: I know, but the Circuit by the court did express itself on what it thought the situation amounted to. It is a continuing process of from day to day.

Mr. Barwick: Yes, the court did say that it was a continuing process. And, because of this, they could look into his subsequent acts, particularly in

the intent. That whole case seemed to bear on the question of intent. The court was more concerned with letting these subsequent acts show intent, but what is relevant was now it said nothing about whether the section was constitutional or unconstitutional. And we can't speculate why it wasn't appealed or what the reason was. But I intend to urge it to this court that the section is unconstitutional regardless of what the Eighth Circuit [107] says.

The Court: I don't know what was urged or what was not urged in that case. I know what the pronouncement is and the decision of the court.

Mr. Barwick: Yes. And if the judge in the court feels that that is the law in this Circuit, why then that would be your decision. But, nevertheless, I urge that it is not the law.

The Court: I will say this: That we don't have to look behind the scenes in every decision.

Mr. Barwick: No.

The Court: The decision speaks for itself. And we assume that everything that had to do with the court's pronouncement was presented to the court.

Mr. Barwick: I don't want to jeopardize my defendant by presuming that it was done in another defendant's case in this particular case. I want to urge to the Court that that regulation is not constitutional, and I particularly want to urge that in this particular case he was charged with failing to report on November 8, 1955, and no other date. And the entire indictment is framed to point to his intent, to

his duty to report on that date. Because of what this regulation says——

The Court: Of course, we haven't wandered too far away from the date in question; that is, here in this case——

Mr. Barwick: Well, not yet. [108]

The Court: The testimony is direct as to the particular date.

Mr. Barwick: Yes, your Honor, it is.

The Court: And so we are not too much concerned with continuing effects up to the present date.

Mr. Barwick: No.

The Court: If a date is established to the satisfaction of the jury, as recited in the indictment, that is the date we are talking about.

Mr. Barwick: If the evidence were limited to that date alone, it would be fine. But, as the Court knows, the Silverman case doesn't limit it to that alone, although I feel that case is wrong.

The Court: The case, of course, that we examined seems to speak on that subject matter.

Mr. Barwick: Yes.

The Court: In fact, it speaks on almost everything that we have discussed in this case, in our case on trial.

Mr. Barwick: I would like to urge one more ground for acquittal. It is not in the written grounds that I gave the Court, but I would like to urge that the government has failed in every respect to show that the notice was actually mailed.

The Court: I am concerned about that, Mr. Duncan. That is one error in your case. [109]

Mr. Barwick: If the Court pleases, there is a case—just a minute; I want to find which one it is—United States versus Rice. United States versus Rice, 281 F 326. The Court in that case said: “Where the fact of notice is made by statute to rest on the presumption that a letter mailed was received, there must be clear proof of the mailing.”

The Court: You are citing a civil case, some other jurisdiction, aren't you? Isn't that a civil case?

Mr. Barwick: That is a draft case, your Honor.

The Court: A draft case?

Mr. Barwick: Yes.

The Court: There is one case recited to the same effect, I think in your instructions, didn't you?

Mr. Barwick: I prepared that instruction before I found this case.

The Court: Yes.

Mr. Barwick: Now, this is a draft case, and it goes——

The Court: What is that case?

Mr. Barwick: United States versus Rice, 281 Federal.

The Court: Versus Wright?

Mr. Barwick: Rice, R-i-c-e.

The Court: 2—what?

Mr. Barwick: 281 Federal 326.

The Court: Where is that?

Mr. Barwick: To my best recollection, your Honor, [110] it is in Texas. It was a Texas case.

The Court: It was a federal case, of course.

Mr. Barwick: Yes, a federal case. And it was dealing with the selective service law and the regulations. And the case is page after page in the decision telling what type of proof is necessary for mailing.

As the Court pointed out, further in that case—it is in my defendant's jury instructions Number 14 and 15.

The Court: Number what?

Mr. Barwick: Number 14 and 15.

The Court: That is in your instructions?

Mr. Barwick: Yes.

Now, under the rule of that case, your Honor, the government has failed to show that this notice was properly mailed. And on that basis alone, I believe the Court could find, after reviewing the law, that the government has not established or carried the burden of proof of showing that the notice was mailed, as required by law, and as decided by this case.

The Court: There is evidence in the case that the mailing was done by a clerk who had that duty to perform, another clerk. The witness who was on the stand, the clerk for the Board, testified as to the custom or the routine. She presented everything for mailing and checked everything, and then it was put in a receptacle, and then from there [111] it was taken by a mailing clerk.

Mr. Barwick: That is correct, your Honor.

The Court: There is nothing in the evidence that——

Mr. Barwick: The mailing clerk was not on the stand. We don't even know what she does.

The Court: ——nothing in the evidence to show a specific act of this mailing. Of course, we have custom. That is evidence.

Mr. Barwick: Yes, the custom.

The Court: We have the practice which is established in the mailing.

Mr. Barwick: But, if the Court please, if I could read this jury instruction aloud, it might help. It said in the case of United States versus Rice:

“To establish mailing of a letter containing notice, in the absence of direct evidence, there must be proof of an invariable custom or usage in an office of depositing mail in a certain receptacle, that the letter in question was deposited in such receptacle, and in addition there must be testimony of the employee whose duty it was to deposit the mail in the post office that he (or she) either actually deposited that mail in the post office, or that it was his (or her) invariable custom to deposit every letter deposited in the usual receptacle.”

Now, on cross-examination with this in mind, I asked [112] the clerk of the Board specifically where she posted the mail, and her invariable custom was to get it together and put it in a communication box or receptacle within the office. And she said, well, that was mailing it. And I asked her again: “Is that where the United States Government picks it up?” And she said, “No.”

So there is no testimony of the employee who actually took it out of the box, invariably or by custom.

The Court: Other than the testimony of the clerk as to what the practice was and that this practice had been carried out and consistently in that manner.

Mr. Barwick: Yes, that is true. But under this case, it says there must be testimony of the employee who takes it down. And we have no testimony of the employee who regularly takes it down.

The Court: That is correct. As I said before, I am concerned about that one point.

Mr. Duncan: Your Honor, we have a presumption that the Ninth Circuit has recognized in many other selective service cases—one of them is the Kaline case. They haven't a slip opinion, but it is a 1956 Ninth Circuit case where they allude to the presumption of the regularity of the performance of official duties.

Now, that point also, your Honor, has been recognized in other Ninth Circuit cases of 1956, one of them, the Uffelman [113] case, I believe.

The Court: Does this case have to do with a situation of this kind?

Mr. Duncan: No, it does not, your Honor. It doesn't apply to mailing. But I would like to make this point: Counsel has moved for judgment of acquittal on the basis of this regulation providing that the mailing of the notice shall be deemed notice. Now, that point hasn't entered into this trial. The jury hasn't been so instructed as yet. The

motion for judgment of acquittal is not the proper time to raise this point. That has never come up. He should object to the instruction if the Court decides to give the instruction, and the Court possibly will not give that instruction. That is tied into this question of mailing. If we use that instruction, then the slight deficiency in the evidence here as to the mailing might become pertinent, but, without the use of that instruction, your Honor, this question of mailing is purely a question of fact for the jury. It is not a matter of law.

The Court: You proposed an instruction as to mailing didn't you?

Mr. Duncan, Yes, I did, your Honor, but it hasn't been given by the Court as yet. It is certainly not before the jury. I say that urging that ground on a motion for judgment of acquittal is premature at this time. Counsel might object to the instruction and then make this point, but the [114] instruction hasn't been given as yet.

Now, the government doesn't intend to rely solely on this receipt of the notice. I don't know whether he got it or not, but I intend to rely quite heavily on this continuing duty theory.

The Court: What do you say about the lack of testimony as to the actual mailing by a clerk?

Mr. Duncan: I say, your Honor, that that without that instruction being given is a question of fact for the jury. And I say this, your Honor, that if that instruction is given by the Court, the jury can also be instructed that that regulation is not to remove this element of knowingly which is

charged in the indictment. We have charged he knowingly failed to report. Now, counsel is assuming that by that regulation the government is contending that he didn't have to have knowledge. We can still argue that he is charged with knowingly failing to report.

The Court: However, a man must have notice before he can report if he is required to report.

Mr. Duncan: That goes to the essential element of the indictment of knowingly, your Honor.

The Court: We are getting back to the very point I am considering: If it is incumbent upon you to prove mailing, and that creates a presumption that notice was given as required by law or regulation, that places the burden on the [115] defendant; and he must meet it if he can. But before arriving at that point, we have the testimony only of the clerk who testified as to custom and practice in mailing, but there is no direct testimony other than the custom. Now, if that custom establishes a fact, there is a different matter. If you have some law on that subject——

Mr. Duncan: No, your Honor, I say——

The Court: But if you rely entirely upon that as the performance of the task of mailing, I am not sure about it.

Mr. Duncan: Your Honor, doesn't that become pertinent? The case counsel has cited says we must show conclusively to mailing only when that mailing is per se to give the man notice. We have to take that further step; we have to show that mailing con-

clusively only in connection with this regulation which your Honor hasn't yet given.

The Court: No, but in the ordinary events, ordinary situations—take a case that isn't a criminal case, any case. If you are going to establish the mailing of a notice, you are going to have to establish it by the person who mailed it, aren't you?

Mr. Duncan: Doesn't that go to weight, your Honor? Isn't that a question of fact for the jury?

The Court: That is what I want you to advise me of, if you have some law on that subject matter. Does that Rice case establish that in that [116] case?

Mr. Duncan: On that point, your Honor, the Rice case says where the government is going to rely on a presumption that mailing amounts to receipt, then they must show clearly the mailing. We haven't as yet relied on this point, that the mere mailing was going to be the receipt.

I may withdraw that instruction.

The Court: What you rely upon is to the fact of the giving of the notice?

Mr. Duncan: On the fact that this man was told in April of 1956, and again in April of 1957, that he had been ordered to report for induction, your Honor, and then I switch over to continuing duty, as pointed out in this Silverman case, and say that he had a continuing duty from November 8 of 1955, up to the date of the return of the indictment to report for induction; and if he had notice in any way during that period, he had a duty to report for induction.

The Court: Is it not mandatory upon a board to notify a person by mail as provided by the statute or regulation, whichever provides for it?

Mr. Duncan: The Board has. We have put on the best testimony available, your Honor. The lady who prepared the order said she prepared it, and she put it in the mail box. Now, the only step that is absent here is the individual that took it from her mail box and put it in another mail box.

The Court: Where is that individual? You [117] haven't produced him.

Mr. Duncan: We don't know who the individual is. We have custom; we have the presumption well recognized by the Ninth Circuit of the regularity of the performance of official duties. And, in the absence of an eyewitness, we have to rely on that.

Mr. Barwick: If the Court please, I would like to say something. The regulations that you asked counsel about, the regulations provide that a man must receive notice; and it provides for the board to mail him a notice. I mean——

The Court: It doesn't say that exactly. He must be given notice.

Mr. Barwick: He must be given notice.

The Court: Yes.

Mr. Barwick: The point we are driving at under the Rice case is there is no evidence sufficient to support the government's case he was given notice. If he was never given notice, regardless of the fact that already he might have looked through his file and found out about it, the Board had attempted to give notice, that doesn't put any obligation on

him. The government has got to carry the burden of showing they gave the proper notice. Then, if he later found out about it, that is where the continuing duty comes in. But he doesn't have the continuing duty until first the government has shown to the Court's satisfaction that the original notice was properly given. [118] And that is where I contend it was not, because the employee who was required to be here——

The Court: You don't need to repeat what you have already stated. You don't need to spend the time.

Mr. Barwick: Yes, your Honor.

The Court: Is there something else?

Mr. Barwick: No.

The Court: Let's look at it from another viewpoint. We have other evidence besides the evidence of the clerk. We have evidence that the defendant himself went down and discussed the matter with the clerk.

Mr. Barwick: That is true.

The Court: And now, isn't the jury entitled to take all of the evidence in the case and determine whether or not he actually did receive or had knowledge, notwithstanding anything which may appear to you to be a deficiency in the link of the process of mailing?

Now, the custom was established, and that custom prevailed. And that is the way the mail was put in the United States Post Office, in the manner stated by the clerk. Now then, wouldn't the actions of the defendant with respect to this entire matter, in

connection with interviews, and what not, wouldn't that be an element which the jury might consider, whether or not he actually received the notice?

Mr. Barwick: That is true, your Honor. But my point [119] is that the government has not made out a case yet, because one essential element of the case is that the Board comply with these steps. And I feel that the evidence is insufficient in that respect.

The Court: Is that for us to say or is it for the jury to say?

Mr. Barwick: It is for the Court to say, if another court—and you agree with that court—has ruled on the point and established whatever evidence is necessary to create the presumption. The government has to rely on a presumption in this case, that notice was duly given. Now, it is true there is a general presumption that administrative acts are carried out by official employees; but that doesn't help us here, because the Rice case says you have got to have the employee who does that act regularly, invariably, and have them testify as to what they did each day when they took the mail down, what box they put it in. And that employee was not there on the stand. There is an essential link missing. Without that link, the government hasn't established, as in their indictment, the notice and order by said Board was duly given. It wasn't duly given if they can't show they didn't mail it.

The Court: Isn't it for the jury to determine?

Mr. Barwick: Not if the Court can determine——

The Court: In other words, has the government [120] proved a *prima facie* case?

Mr. Barwick: I don't believe so, your Honor, under the rules of the Rice case. That is why I have included this ground in my motion for acquittal, because the Rice case discusses what is necessary.

Mr. Duncan: Your Honor, I think this is a perfect situation where a presumption of regularity in the performance of official duties has to apply. This presumption arose in precisely this situation where there were a number of employees performing these acts.

We have had the witness testify who prepared this order. She said she put the initials on it. She remembered it specifically, because she remembers this defendant. She put it in the box, and she never saw it again. And she testified what the regular custom was there.

Now, that is precisely the situation where there might be some man that that is his job to run in and out from every desk to pick up and drop these things in the mail box.

Mr. Barwick: Then, that man should have been here, under the Rice case.

Mr. Duncan: That is the reason this presumption arose, your Honor, because in business offices and in government offices there is no way of determining who picked up a particular letter. And Mr. Barwick's case is not applicable here until the government relies solely upon that regulation. [121]

The Court: There is evidence here the defendant came to the Board and went over the file, and

the clerk showed him the order for the induction. There is that evidence in the case.

Mr. Barwick: That is true, your Honor, but that doesn't bear on the question of whether he was duly given notice.

The Court: It may have some bearing on it if the jury believes that from that piece of evidence that he had received a notice.

Mr. Barwick: That is why I am making this motion, because I feel the law doesn't allow that even to get to the jury, unless the government has complied with every step in the regulation and taken every step that the regulation provides.

The Court: Furthermore, it is a matter of credibility of witnesses. The jury can disbelieve the defendant if the jury sees fit.

Mr. Barwick: That is true, your Honor.

The Court: They don't have to believe him, either in whole or in part.

Mr. Barwick: But the very basis for a motion for judgment of acquittal, to put the question to the Court: Has the government made out a *prima facie* case according to law? And, according to law, the government has to get the employee [122] up there on the stand that actually mailed this. It is true in civil cases, there, the presumption of regularity of administrative acts is greater; but this is a criminal case.

The Court: Furthermore, the minutes, do they not show the mailing?

Mr. Duncan: Yes, they do, your Honor.

The Court: Doesn't that appear in the minutes?

Mr. Duncan: It is in the evidence.

Mr. Barwick: In our cross-examination the clerk said that she initials that when she puts it in the inner-office communication receptacle.

The Court: I know, but, aside from that, does not the minutes of the Board show the mailing of the notice?

Mr. Duncan: Yes, your Honor.

Mr. Barwick: Your Honor, a rubber stamp indicates "Mailed." Then, it is initialed.

Now, I ask the clerk: "Do you initial it after you put it in the U. S. mail box?" And she said, "No."

The Court: Let's look at the entry on the minutes of the Board and see what it says.

Mr. Duncan: This is it right here. That is the order, the order number, that 252, your Honor.

The Court: "Form Order 252 mailed." Now, does that mean anything on the minutes of the Board?

Mr. Barwick: No, because—— [123]

The Court: It is in evidence, is it not?

Mr. Duncan: It is an official government record, your Honor.

Mr. Barwick: Yes, but——

Mr. Duncan: Under the law it is proof of the fact there asserted.

Mr. Barwick: We have direct testimony from the clerk, your Honor, that she stamps that and puts it in the inner-office box. So, regardless of what this says, her own testimony says she put it in

the box, and she has already stamped it; and it isn't mailed. That is why I asked her.

The Court: But if she testified definitely as to the custom and practice where another clerk does the mailing, and makes an entry of it——

Mr. Barwick: That is the missing link, the other clerk. The other clerk should have been on the stand and testified as to what she did and when she did it, how she did it, even if she remembered doing it, if she could. That is what the Rice case holds.

Mr. Duncan: I wish counsel would read us the Rice case where it says that, your Honor. Counsel is citing a principle of law that I have some doubts about.

The Court: Is there any communication in the file from the defendant that he never received a notice? Did he ever notify the Board in that [124] respect?

Mr. Barwick: I am not sure. Just a minute. I believe there is a letter.

Yes. Would you like to read the photostatic copy or——

The Court: Just tell me.

Mr. Barwick: It says here on September 4, 1956—that was the letter that the Court read that we argued about and were discussing. It said: "I definitely did not receive any other induction notice; and, if I did, I would have reported as before.

The Court: What else?

Mr. Barwick: The letter is quite long. Would you like me to read the whole thing?

The Court: No.

Mr. Barwick: That is the only part. It is in that paragraph: "I have always complied with all the instructions of the Board. Never have I tried to avoid any duty by means of trickery. Therefore, I honestly object to your conclusion that I have been delinquent in advising the Board of my home address."

That is what the F. B. I. talked to him about; that they didn't have his home address.

"I concealed nothing and refused induction only because of being conscientiously opposed"—he is referring to his previous induction.

"I reported at the induction station because of [125] receiving mail at my home address at San Diego. I definitely did not receive any other induction notice." There he is referring to the fact that he received a previous induction notice and went to the induction station a couple of years prior, and that is the only induction notice he ever received.

The Court: There is also some evidence of some conversation that even if he had gotten his notice, he would have refused induction.

Mr. Barwick: That is one statement from the clerk of the board; and, yet in the very letter, he says: "I would have reported as before."

The Court: Yes, but then "to report" and "to report for induction" are two different "reports," aren't they? In other words, he would have reported, but he would not have submitted?

Mr. Barwick: He would not have submitted, that is correct.

The Court: He said under no circumstances would he be inducted; he would refuse to be inducted?

Mr. Barwick: Right.

The Court: Is that correct?

Mr. Barwick: That is right. But that has no bearing on whether he would show up.

The Court: It may not. It may not, but it is in evidence; and the jury might consider everything that is in [126] evidence. I don't know.

I am going to investigate this case here; I mean, the citation that you have. Do you have any other citations?

Mr. Barwick: No, that is the citation on the point of mailing.

Did the Court wish to read it?

The Court: I want to read it myself.

Mr. Barwick: It is quite long.

The Court: Is that the case you cited?

Mr. Barwick: Yes, this is the case.

The Clerk: The Court is now in recess.

(Recess taken.)

(The proceedings were resumed within the hearing of the jury:)

The Court: Do you stipulate the jurors and the defendant are now present?

Mr. Barwick: I so stipulate.

Mr. Duncan: It is so stipulated, your Honor.

The Court: Ladies and gentlemen, we have almost concluded our discussion as to some legal

matters that you are not concerned with for the moment, and we will suspend now until this afternoon at 1:45. And I hope we will be ready to proceed at that time; so please return and be here at 1:45. And keep in mind the admonition heretofore given. You are now excused. [127]

(The following proceedings were had between Court and counsel, outside the hearing of the jury:)

The Court: We will go back into chambers and finish up the discussion.

(Whereupon at 11:50 o'clock a.m. the Court recessed until 1:45 o'clock p.m. the same [128] day.)

Thursday, November 14, 1957—2:25 P.M.

The Court: Do you stipulate the jurors and the defendant are now present in this case on trial?

Mr. Duncan: I so stipulate, your Honor.

Mr. Barwick: I so stipulate, your Honor.

The Court: Both sides have rested, is that correct?

Mr. Duncan: Yes, your Honor.

Mr. Barwick: Yes, your Honor.

The Court: Let the record show that prior to the beginning of the arguments counsel have been informed as to the instructions proposed to be given by the Court.

You may now proceed with your arguments.

(Then followed opening argument by counsel for plaintiff.)

(Then followed argument by counsel for defendant.)

The Court: I think we will take a recess at this time, ladies and gentlemen. It is a little warm in here, and we will see if we can cool off the court room. Take a short recess. Please keep in mind the admonition.

(Recess taken.)

The Court: Do you stipulate the jurors and the defendant are now present?

Mr. Barwick: I so stipulate, your Honor.

Mr. Duncan: It is so stipulated. [129]

The Court: You may proceed.

(Then followed closing argument by counsel for plaintiff.)

The Court: Ladies and gentlemen, I am not going to instruct you this evening. It will take about forty minutes to instruct you; and, by that time, it will be after 4:00 o'clock. And that is pretty late to send a jury out to consider a case. So we will get an early start in the morning at 9:45, and you will have your instructions, and the case will be submitted to you at that time.

So we will have a recess at this time. And, again, you are to keep in mind the admonition. The case will not be completed until it will have been submitted to you after the instructions shall have been

given. Therefore, keep yourselves in that condition that you will await passing judgment in the case until after the instructions shall have been given and until you go into the jury room.

You are now excused until tomorrow morning at 9:45. Please be here at that time. Recess until that time.

(The following proceedings were had between Court and counsel outside the hearing of the jury:)

The Court: Is there anything further?

Mr. Duncan: I have nothing further, your Honor.

The Clerk: Is your Honor going to rule on that motion? [130]

The Court: Which motion is that?

The Clerk: The motion for an acquittal.

The Court: That motion, I thought I ruled on it. The motion is denied. I did it in chambers, but I neglected to announce it in open court.

(Other matters.)

The Court: Very well. Recess.

(Whereupon at 3:35 o'clock p.m., Thursday, November 14, 1957, the court recessed until 9:45 o'clock a.m. the following day.) [131]

Friday, November 15, 1957—9:45 A.M.

The Clerk: The case on trial: United States versus Venus.

The Court: Do you stipulate the jurors and the defendant are now present?

Mr. Duncan: It is so stipulated, your Honor.

Mr. Barwick: I so stipulate, your Honor.

The Court: I am about to give the instructions to the jury in this case, and the door will be watched so that no one comes in or goes out during the giving of these instructions. Any people in the courtroom who desire to leave, either go now or wait until the instructions shall have been finished.

The instructions are an important element in the trial of the case, and I know that the jury wants to concentrate its attention on the instructions of the Court. And the purpose of guarding the doors is to see that we are not disturbed during the giving of the instructions.

First of all, I want to thank the members of the jury for their faithful attendance here during the trial of this case, and I trust that you will listen to these instructions with the same attention that you have evidenced during these proceedings.

(Then followed the instructions to the jury as read by the Court.) [132]

Friday, November 15, 1957, 9:45 A.M.

(Refer to Line 25, Page 132 of Reporter's Transcript of Proceedings which reads as follows: "Then followed the instructions to the jury as read by the Court.")

COURT'S INSTRUCTIONS TO THE JURY

The Court: It now becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in this case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment and with sound discretion, and in accordance with the rules of law now being stated to you.

The jury must accept the instructions of the court as comprising together a correct and a complete statement of law governing this case. You must not assume the existence of any law not stated in these instructions, nor are you to speculate or guess as to what the law is. And regardless of any **opinion** that you may have as to what the law ought to be, it would be a violation of your sworn duty as jurors to base a verdict upon any other view of the law than that covered in these instructions.

If during your deliberations doubt should arise in your minds concerning the law upon any given question, you [206] should so advise the court, and the court will then again read the instructions covering the questions as to which you may be in doubt.

This case presents several questions or propositions of law, and it is the duty of the court to instruct you fully upon each proposition. Some propositions may be covered by only one instruction,

while others may require several instructions. You must not allow yourselves to be influenced as to any question of law or fact by the number of instructions given to you upon such question. The court does not intend to stress the relative importance of any question of fact or law either by the number of the instructions given to you on a particular proposition or by the order in which all of the instructions are given. And you are not to single out any certain sentence or any individual point or instruction, and ignore the others, but you are to consider all of the instructions, and as a whole, and to regard each instruction in the light of all of the others.

At times throughout the trial the court has been called upon to pass on the question whether certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and you are not to draw any inference from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the court does not determine [207] what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

You must not consider for any purpose any evidence which may have been stricken out by the

court; such matter is to be treated as though you never had known of it.

If during this trial I may have said or done anything which might have suggested to you that I am inclined to favor the claims or the position of either side, you will not suffer yourself to be influenced by any such suggestion; for I have not expressed, nor have I intended to express, nor have I intended to intimate any opinion as to which witnesses are, or are not, worthy of belief; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

If any counsel has intimated by any question or in any other manner that certain hinted facts were, or were not, true, you must disregard any such intimation, and you must not draw any inference therefrom; you must not consider as evidence any statement of counsel made in your presence, unless such statement was made as an admission or as a stipulation. [208]

Keep in mind at all times that you are the exclusive judges of the facts and of the effect and the value of the evidence, but that you must determine the facts from the evidence produced here in court.

By the filing of an indictment no presumption whatsoever arises to indicate that the defendant is guilty, or that the defendant has had any connection with, or responsibility for, the acts charged.

A defendant is presumed to be innocent at all

stages of the proceedings until the evidence shows such defendant to be guilty beyond a reasonable doubt. The presumption of innocence follows a defendant to the jury room to be weighed by you as evidence along with the other evidence.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, and all facts which have been admitted or stipulated, and all applicable presumptions stated in these instructions.

You are to decide this case solely upon the evidence that has been received by the court, and inference you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in my instructions, in accordance with the law as I now state it.

There are two types of evidence from which a jury may properly find a defendant guilty of an offense. One is [209] direct evidence, such as the testimony of an eye witness. The other is circumstantial evidence, that is to say, the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant, the jury shall be satisfied of the defendant's guilt beyond a reasonable doubt from all of the evidence in the case.

A stipulation by and between counsel for the parties as to any facts is binding upon you, and those facts shall be deemed by you as true in all respects.

and you are to rely thereon and you are bound thereby insofar as those particular facts are concerned.

The burden is upon the prosecution to prove a defendant guilty beyond a reasonable doubt of every element of the crime charged. The law does not impose upon a defendant the duty of producing any evidence.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence.

The term "reasonable doubt," as used in these instructions, is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after [210] the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

The requirement that a defendant's guilt be proved beyond a reasonable doubt is to be considered as included in each instruction given.

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of witnesses and after weighing the various factors of evidence, you should believe that

there is a balance of probability pointing to the accuracy and honesty of the one witness.

A witness may be impeached by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the cause on trial.

A witness wilfully false in one material part of his testimony is to be distrusted in others. The jury may reject the whole of the testimony of the witness who has wilfully sworn falsely as to a material point; if you are convinced that a witness has stated what was untrue as to a material point, not as a result of a mistake or by inadvertence, but wilfully and with the intent to deceive, then you may treat all of his [211] or her testimony with distrust and suspicion, and you may reject all unless you shall be convinced that he or she has in other particulars sworn to the truth.

You are the sole judges of the credibility of the witnesses and the weight which is to be given to their testimony. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by evidence affecting his reputation for truth, honesty and integrity or his motives; or by contradictory evidence. In judging the credibility of the witness in this case, you may believe the whole or any part of the evidence of any witness, or you may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable persons.

You should carefully scrutinize the testimony

given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to a plaintiff or to a defendant, the manner in which he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility.

In using the term "witness" I refer to all witnesses both male and female. And also that term includes the defendant who, having taken the witness stand, has therefore become a [212] witness; and you are to consider his testimony the same as any other witness in accordance with all of the instructions I have and I am giving on that subject matter.

You are instructed that if the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty under the law to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If on the other hand, one of the possible conclusions should appear to you to be reasonable, and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and reject the unreasonable, bearing in

mind, however, that even if the reasonable deduction points to the defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilty.

All testimony as to admissions alleged to have been made by a defendant outside of court should be considered with caution and weighed with care.

An admission consists of any statement or other conduct by a defendant whereby he expressly or impliedly acknowledges a fact that contributes in some degree to the [213] proof of his guilt of an alleged crime for which he is on trial, and which statement was made or conduct occurred outside of that trial.

The Indictment in this case charges that the defendant Carlin Constantine Venus, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 140, said Board being then and there duly created and acting, under the selective service system established by said Act, in San Diego County, California, in the Southern Division of the Southern District of California; pursuant to said Act and the regulations promulgated thereunder, the defendant was classified in Class 1-A and was notified of said classification and a notice and order by said Board was duly given to him to report for induction into the armed forces of the United States of America on November 8, 1955, in San Diego County, California,

in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said Act and the regulations promulgated thereunder in that he then and there knowingly failed and neglected to report for induction into the armed forces of the United States as so notified and ordered to do.

The Indictment in this case is brought under the [214] Universal Military Training and Service Act, which provides in pertinent part as follows:

“Any person who * * * knowingly * * * evades or refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required by him under this (the Universal Military Training and Service Act) or rules or regulations * * * made pursuant to this (Universal Military Training and Service Act) * * * shall * * * be punished,” as provided by law.

The Universal Military Training and Service Act, portions of which I have previously read to you, was passed by the Congress of the United States pursuant to authority given to the Congress by the Constitution to provide for the defense of the nation. You are not here concerned with the wisdom or the unwisdom of this statute. It is the duly promulgated law of the land and you must be governed by its mandate in the consideration of the evidence and in the determination of its case.

To better understand this law I shall summarize some of its provisions for you.

The law provides that it shall be the duty of every male citizen of the United States who is between the ages of 18 and 26, on the day or days fixed for registration, to present himself and submit himself to registration.

The President is authorized to select and induct into the armed forces of the United States for training and service those registrants who have been selected in an impartial manner [215] under such rules and regulations as the President may prescribe.

The Act further authorizes the President to prescribe the necessary rules and regulations to carry out the provisions of the Act, and to establish selective service civilian boards, including local boards and appeal boards. The local boards, under the terms of the Act, have power to hear and determine all questions or claims with respect to induction in or exemption or deferment from training and service, and the decisions of such local boards are final, except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe.

If any registrant is dissatisfied with his classification by his local board, or if his claim for exemption from service is denied by such local board, he then may appeal to his appropriate appeal board within a fixed time prescribed by the selective service regulations and may appeal from each new classification or reclassification by the appeal board.

You are not here sitting as a court of appeal to determine whether the local board was correct in its determination of the classification of the defendant. The local board's action is final and you are bound to accept the classification given to the defendant. You are not to determine from the action of the local board and all the other evidence in the case whether there was a refusal on the part of the defendant to do what the law required, namely, to report for induction [216] into the military service pursuant to the lawful order of the local board, and whether, if you find beyond a reasonable doubt that there was such a refusal, the defendant did so refuse knowingly.

I am not sure whether I read this correctly. I will reread this paragraph.

You are not here sitting as a court of appeal to determine whether the local board was correct in its determination of the classification of the defendant. The local board's action is final and you are bound to accept the classification given to the defendant. You are to determine from the action of the local board and all the other evidence in the case whether there was a refusal on the part of the defendant to do what the law required, namely, to report for induction into the military service pursuant to the lawful order of the local board, and whether, if you find beyond a reasonable doubt that there was such a refusal, the defendant did so refuse knowingly.

I reread this because I thought I had misread the word during the prior reading; so you are to dis-

regard the prior reading and consider only the reading that I just finished.

You are instructed that the classification 1-A means that a registrant is available for military service.

You are instructed that in order to find the defendant guilty as charged in the Indictment, you must find that: [217]

(1) The defendant on or about November 8, 1955, was a registrant of Local Board No. 140 in San Diego County, California.

(2) That at such time in such place, the defendant was classified in Class 1-A by said Board.

(3) That the defendant was ordered by said Board to report for induction into the armed forces of the United States on November 8, 1955, in San Diego County, California.

(4) That the defendant did on such date, and at all times thereafter, knowingly failed to report for induction.

The word "knowingly" as used in the Indictment can be taken only as meaning deliberately and with knowledge and not something which is merely careless or negligent or inadvertent.

Knowledge and intent are each elements of the crime charged.

Knowledge may be proved by circumstantial evidence. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye-witness account of the state of mind with which the acts were

done or omitted. But what a defendant does or fails to do may indicate knowledge or lack of knowledge.

The jury should consider all the facts and circumstances in evidence which may aid determination of the issue as to knowledge, including any acts and statements of the defendant.

Intent may be established in the same manner as knowledge, as I have just instructed you. [218]

You will note that the Indictment charges the defendant failed to report for induction into the armed forces of the United States on November 8, 1955.

The selective service regulations which are passed pursuant to law provide that "When it becomes the duty of a registrant * * * to perform an act * * * the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act * * * shall in no way operate as a waiver of that continuing duty."

In this connection, if you find that the defendant knowingly failed to report for induction at any time between November 8, 1955, and August 8, 1957, the date of the return of the Indictment, you may find him guilty of the offense charged.

The defendant is not on trial for any act or conduct not alleged in the Indictment.

You are not to consider the matter of the punishment of the defendant, in the event of a conviction.

This matter is exclusively within the province of the court and should not influence your deliberations in any way.

In some of these instructions, I may mention the jurors by the use of the masculine term. However,

when speaking of the jurors, or of the jury, I intend to include all the members of the jury, the ladies as well as the gentlemen.

The attitude and conduct of jurors at the outset of [219] their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is fallacious. Remember that you are not partisans or advocates in this matter, but are judges, The final test of the quality of your service will lie in the verdict which you return to the court, not in the opinions any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. And to that end, the court would remind you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

It is your duty to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but you do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be in-

fluenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor [220] such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purposes of returning a verdict or solely because of the opinion of the other jurors.

In order to return a verdict it is necessary that each juror agree thereto. And your verdict must be unanimous.

When you retire to your jury room to deliberate, you will select one of your number as foreman, who will represent you as your spokesman in the further conduct of this case in this court. If it becomes necessary during your deliberations to communicate with the court, do not indicate in any manner how the jury stands, numerically or otherwise.

And when you have agreed upon a verdict, you will have the foreman sign the same, and you will return such verdict into court.

(Continue reading Line 1, Page 133 of Reporter's Transcript of Proceedings.) [221]

The Court: There has been prepared for your use in the jury room a form of verdict which reads, as follows:

"United States of America, Plaintiff, versus Carlin Constantine Venus, Defendant. Verdict: We, the jury in the above-entitled cause, find the defendant, Carlin Constantine Venus (blank), as charged in the indictment."

And there is a blank line for the signature of the Foreman, and the formal verdict is dated November 15, 1957, San Diego, California.

As already instructed, you will have the foreman insert in the blank space whatever your verdict may be in this case and sign the verdict and come back and report the verdict.

May it now be stipulated that there may go into the jury room, if the jury requests it, without further formality the indictment or copy thereof together with all the exhibits in this case?

Mr. Duncan: Yes, your Honor.

Mr. Barwick: If the Court please, I would like to make a motion.

The Court: Just a moment; I will give you that opportunity.

Mr. Barwick: I see, yes.

The Court: I am just wondering whether I should now excuse the jury for their deliberations or——

Mr. Barwick: I didn't want—— [133]

The Court: Whatever you have to say it should be said without the hearing of the jury.

Mr. Barwick: Yes. I didn't want them to get there and have us say it and maybe have to bring them back and send them out again. I don't know where they go to. They will have to be excused, anyhow.

The Court: If you can whisper without its being a stage whisper, as we hear in the movies.

Mr. Barwick: I doubt if I can whisper and get it across.

The Court: If it may be stipulated, we will send the jury into the jury room; and, then when you finish, then the jury may come back in——

Mr. Barwick: If necessary.

The Court: ——and we will have the bailiff sworn to take charge of them.

Mr. Barwick: Yes.

The Court: Is that satisfactory?

Mr. Barwick: Yes, that is satisfactory.

The Court: Is that stipulated?

Mr. Duncan: Yes, your Honor, I will stipulate to that.

The Court: Ladies and gentlemen, you will retire to the jury room. We will call you back shortly.

(The following proceedings were had between Court and counsel outside the hearing of the jury:) [134]

The Court: This is your opportunity—I am speaking now to counsel—to put into the record any omissions or corrections as to the instructions given by the Court:

Mr. Barwick: If it pleases the Court, I would like to refer to the instruction given by the Court. It was in four parts. It is entitled, “Defendant’s Number 4,” and I——

Mr. Duncan: Government’s Number 4, I believe.

Mr. Barwick: Pardon me. “Government’s Number 4”; and I would like to object to the inclusion in the instruction of subparagraph 4. I will read the whole paragraph, and then I will state the part I wish deleted.

“(4) That the defendant did on such date, and at all times thereafter, knowingly fail to report for induction.”

I feel that this is an erroneous statement of the law and can only be corrected by deleting the words: “* * * and at all times thereafter * * *” It is the defendant’s contention that he only had one duty, namely, to report on November 8, 1955, as charged in the indictment, and that any question of what he did thereafter is not competent under the charge in the indictment.

I request of the Court that the instruction be re-read to the jury deleting that particular clause.

The Court: All you need to do is proceed with your objections and state them into the record.

Mr. Barwick: In connection with [135] Government’s Instruction Number 7, I believe the whole instruction should be withdrawn from the jury, because it charges the defendant with a duty to report on November 8, and thereafter that he had a continuing duty to report. I feel that this is an erroneous conception of the law, that he had a duty to report, particularly in light of the fact that if the jury believes him, that he never received an order or an order was never given.

Those are the only objections to government’s instructions.

I would like to request of the Court that it give Defendant’s Instruction Number 12.

The Court: You have already requested that. You are now stating your objection because the Court has not given them?

Mr. Barwick: Yes. I am now objecting because the Court has not given Defendant's Number 12.

I believe that under the facts of this case the defendant mailed a letter. The jury is entitled to know that there is a presumption that the letter he mailed was received; it was properly addressed. There has been no such instruction to the jury. The jury can well find, if they were instructed, that there is a presumption that the letter had been mailed, it was duly stamped and addressed, and that the parties live at that address; that the local board receive it; and that, therefore, they had that letter and didn't send his order to [136] report to his last known address.

I object to the Court's failure to give Defendant's Number 13, in that there must arise in the juror's minds some type of presumption from the fact that the testimony stated the usual order of mailing in the government's office. However, this instruction should be given to show that there was no direct evidence that a public officer performed his duty and, therefore, the presumption that the mail was taken care of regularly should fall.

I object to the Court's failure to give Defendant's Number 14, in that in this case there is a great question of whether or not the mail was actually sent. And Defendant's Number 15 instructs the jury on the law pursuant to the Rice case as to what is necessary for the government to establish to perform its duty in making out a case of mailing a notice.

I object to the Court's failure to give Defendant's Number 18. Under the defendant's theory of the case, the jury should have been instructed that if no new notice was given, then defendant never had a duty to report.

I object to the Court's failure to give Defendant's Number 19. Under the defendant's theory of the case, he has only been charged with a failure to report on November 8, 1955, and that any evidence concerning his failure to report thereafter was not charged in the indictment and was not proper for the jury to consider. [137]

I object to the Court's failure to give Defendant's Number 20, which specifies the difference between failure to report and failure to submit. Defendant contends that whether or not he would have ultimately submitted to induction has no bearing upon the question of whether or not he would have reported; and the jury should have been so instructed in order to make up that distinction.

The Court: Wait a minute. Was there any instruction as to submitting for induction? Is that what you were talking about?

Mr. Barwick: No, there was no instruction on submitting. It was an instruction on reporting. It is two different acts. My contention is—

The Court: What is the instruction that you require?

Mr. Barwick: The defendant is charged—this is Defendant's Number 20—with failure to report for induction and not for failure to submit to induction. And, therefore, any evidence bearing on the

question of whether or not defendant intended to submit for induction is to be disregarded in determining whether or not the defendant had any criminal intent on the charge of failure to report.

I object to the Court's failure to give Defendant's Number 21. Under the defendant's theory of the case, if the jury should find that an order to report was never mailed to his last known address, then they must find him not guilty. [138]

I object to the Court's failure to give Defendant's Number 23. Under his theory of the case, again, anything that took place after November 8, 1955, had no bearing on the question before the jury as framed by the indictment. In that particular instruction the jury is informed, or should have been informed, that the defendant didn't have an obligation to report if he never received the order to report as specified in the regulations.

I object to the Court's failure to give Defendant's Number 25. I believe that this instruction should have been given to the jury, so that they would know that if the defendant actually went to the local board and the Board, through its agent or employees, failed to inform the defendant what to do or did inform him that there was nothing they could do, that the government has put themselves in the position of waiving any right to have the defendant to continue to report by their own actions; and they should be estopped from prosecuting him or attempting to convict him on this continuing duty to report theory. By their own acts they have put him in a position where he failed to report because

of things actually told to him by the government's board or the clerk of that board.

I have no further objections to any other instructions, your Honor.

Mr. Duncan: The government has no objections or [139] corrections to the instructions, your Honor.

The Court: It is possible that the jury, in view of the nature of the case, may require the instructions so they can read them themselves. Is there any objection if the Court may send in the instructions?

Mr. Barwick: I have no objection, your Honor.

The Court: If they request them?

Mr. Barwick: If they request them.

Mr. Duncan: I have no objection in the event they are requested, your Honor.

The Court: Very well.

Call back in the jury.

Now, you were going to substitute, are you, the photostats of the original file?

Mr. Duncan: Not until the conclusion of the case, your Honor.

The Court: What is that?

Mr. Duncan: The original file is easier to read than the photostat. I think if counsel would rather have the originals in, I would, too.

The Court: What is that?

Mr. Duncan: Rather have the originals stay in evidence.

The Court: Yes.

Mr. Duncan: At this point, but removed or substituted at a later time. [140]

The Court: Is that satisfactory?

Mr. Barwick: That is satisfactory.

(The proceedings were resumed within the hearing of the jury:)

The Court: Do you stipulate the jurors are now present and the defendant is in court?

Mr. Barwick: I so stipulate, your Honor.

Mr. Duncan: It is so stipulated, your Honor.

The Court: At this time we will excuse the alternate juror. We appreciate your attendance, and you will be notified when to appear again.

Juror No. 13: Thank you, your Honor.

The Court: The officers may now be sworn to take charge of the jury.

(The bailiffs were duly sworn.)

The Court: Ladies and gentlemen, you may now retire for your deliberations.

(Whereupon, at 10:40 o'clock a.m., Friday, November 15, 1957, the jury retired for its deliberations.)

The Clerk: Your Honor, this file may go in now?

The Court: What is that?

The Clerk: This exhibit may go in now to the jury, I take it, without further formality?

The Court: The exhibit, that is correct, without further formality. Is that right? [141]

Mr. Barwick: Yes, the original.

The Court: That is the stipulation: All exhibits

may go into the jury room without further formality.

(Thereupon, the exhibit was passed to the jury.)

The Court: Recess at this time.

(Recess taken.) [142]

Friday, November 15, 1957—2:00 P.M.

(Other matters.)

The Court: Call in the jury. Have the jury come in.

Juror No. 9: Your Honor.

The Court: Just one minute. We have one juror short. We will wait for her.

Do you now stipulate all the jurors and the defendant are in court?

Mr. Duncan: I so stipulate, your Honor.

Mr. Barwick: It is so stipulated, your Honor.

The Court: Very well. The Foreman has a request to make.

Juror No. 9: Your Honor, the jury has a request here I would like to have clarified. Shall I read it or give it to the bailiff?

The Court: You give it to the bailiff, and I will read it.

(Pause.)

The Court: I can reread any instruction you desire. Is there some instruction you desire to have reread? What instruction is that we are talking about?

Juror No. 7: You had a lot—excuse me, Judge, but you had a lot of instructions, and for me to go back and specify which one you are referring to—but, if I may orally, [143] what I am interested in——

The Court: Now, just a moment, please.

Juror No. 7: Yes, sir.

The Court: Who is the Foreman?

Juror No. 7: This gentlemen here.

The Court: The jury speaks through the Foreman.

Juror No. 7: Thank you, sir.

The Court: Anything you have to ask, you consult with the Foreman and let him make the request, unless he knows your request at this time.

Juror No. 9: I am interested from 28 on.

The Court: I will read the question as you have it: "Does the order reading to report for induction in the Board 140 office legally obligate the defendant to report for induction?"

All I could do is read you the instructions on that subject matter. That is the only way I can answer that.

Juror No. 7: That won't clarify nothing.

The Court: Then, you will have to deliberate on the facts and heed the instructions that were given. I could read to you the instructions that I have given on that subject matter.

Juror No. 7: Judge, I am sorry, I can't——

The Court: If you want to consult, you may go back and consult in the jury room. [144]

Juror No. 7: I don't think that is necessary, Judge.

The Court: Listen, this is no place to be arguing the case.

Juror No. 7: I am not arguing, sir, but I have told the chairman just exactly what I wanted presented to the Judge.

The Court: I am sorry, you will have to make your request through the Foreman. So maybe you had better go back into the jury room, so he will be fully informed as to just what you want to know; then he can make your request.

Juror No. 9: I think, your Honor, we will go back into the jury room.

The Court: I think you might go back to the jury room. If you want the instructions, I will send you in all the instructions I gave you, if that is what you want. If you have only one or two instructions you desire read, let us know which ones they are, and I will read those. Now you can go back in the jury room and deliberate.

(Whereupon, at 2:11 o'clock p.m., the jury returned to the jury room for further deliberation.)

The Court: Will counsel come forward here. We can discuss the matter now. They want the instructions, so I will send the instructions in there.

You remember that one instruction I interpolated into the record as to the witnesses, the masculine term applying to both female and male witnesses;

and I stated that was also [145] applicable to the defendant? You remember that?

Mr. Barwick: Yes, I remember.

The Court: So, I did not read the instruction that I usually give, in view of that interpolation. However, I don't have the verbatim interpolation that I made. So, if it is agreeable to you, I will send in—this is the part here.

Mr. Barwick: In substance, I assume it is about the same.

The Court: What is that?

Mr. Barwick: In substance it is about the same?

The Court: Yes. Here it is: "When a defendant has become a witness and has testified, you are to estimate and determine his credibility in the same way you would consider the testimony of any other witness in accordance with the instruction given on that subject matter."

But we can have it read.

Mr. Barwick: No, that is not necessary.

The Court: If you have no objections, I can send that in in lieu of the interpolation.

Mr. Barwick: That will be satisfactory.

Mr. Duncan: The government has no objection, your Honor.

The Court: All right.

Then, I may have interpolated a word or two here and there without taking away the context of the instruction. [146]

And, furthermore, some of these instructions have citations that I didn't read. Is there any objection to

sending these in with those citations in, or shall we strike them out?

Mr. Barwick: I prefer that the citations in the defendant's instructions, particularly——

Mr. Duncan: Government's instructions.

Mr. Barwick: Government's instructions.

The Court: Be eliminated, is that it?

Mr. Barwick: Be eliminated, if possible, or mask over them.

The Court: I will do that in yours also.

Mr. Barwick: That is fine.

The Court: If we are going to eliminate one side, we will eliminate them all.

Then, I had headings. You see, "Evidence Stipulated by Counsel."

Mr. Barwick: That is all right.

The Court: Do you object to these headings remaining?

Mr. Barwick: No.

The Court: And something like that, you see, "Burden of Proof," and——

Mr. Barwick: No objection to the classifications on them.

The Court: And here is some "Caljic," and all that. [147]

Mr. Barwick: No, that is perfectly satisfactory.

The Court: "Baji"—B-a-j-i—"25."

Mr. Barwick: That is all right.

I just believe there are one or two by the government in the case that have a citation. There are only two of them, of government's, I think, maybe three. Number 3-A, Number 5——

The Court: Wait a minute until I get to them. Number 3-A. I will just delete that.

Number what?

Mr. Barwick: 5.

The Court: Number 5.

Mr. Barwick: And Number 7.

The Court: Number 7?

Mr. Barwick: Yes.

The Court: I will leave this in. Some of these instructions I may have mentioned to the jury about the use of the masculine term, and so forth.

Mr. Barwick: That is right.

The Court: I may have interpolated on that instruction. There is no objection?

Mr. Barwick: There is no objection, your Honor, to that.

The Court: Let's see. I don't think I gave any of your instructions.

Mr. Barwick: No. [148]

The Court: There is nothing to delete, is there?

Mr. Barwick: No.

The Court: Very well.

I am now handing the instructions as I have them here to be sent into the jury room, to counsel for their perusal, before sending them in there.

Mr. Duncan: The government is satisfied, your Honor.

The Court: Subject to the interpolations and corrections that I may have made as I read the instructions.

Mr. Barwick: It is satisfactory to the defendant. No objection.

The Court: Let me see that. Just a minute. There is one place where I want to strike out a plural. Here is a duplication. I want to take one of these out about the use of the male term to include a female. There is another one in there.

I will strike out the words "presumption and inference." Here, I struck that out. Here it is. I will change it to "* * * each element of the crime charged."

Will you bring me the fastener?

The Clerk: Here, Judge. See if this will work.

The Court: All right. That catches it.

I am now handing the instructions to the clerk, as you have seen. It may now go into the jury room as stipulated by counsel. [149]

(Other matters.)

The Court: Recess at this time.

(Whereupon, at 3:00 o'clock p.m., a short recess was taken until 3:05 o'clock p.m.)

The Court: Call the case.

The Clerk: The case on trial: United States versus Venus.

The Court: Do you now stipulate the jurors and the defendant are present?

Mr. Barwick: I so stipulate, your Honor.

Mr. Duncan: It is so stipulated, your Honor.

The Court: Ladies and gentlemen of the jury, have you reached a verdict?

Juror No. 9: We have, your Honor.

The Court: Just hand it to the clerk, please.

(Pause.)

The Court: The clerk will read the verdict.

The Clerk: "United States District Court, Southern District of California, Southern Division. United States of America, Plaintiff, versus Carlin Constantine Venus, Defendant. Verdict: We, the jury in the above-entitled cause, find the Defendant, Carlin Constantine Venus, Guilty as charged in the Indictment. James R. Lewis, Foreman of the Jury. Dated: November 15, 1957; San Diego, [150] California."

* * *

Monday, December 2, 1957—10:00 A.M.

(Other matters.)

The Court: Next matter.

The Clerk: Number 2. United States versus Venus.

Shall I call the motion for new trial first, your Honor? It also is on for sentence.

Mr. Barwick: Ready for the defendant, your Honor.

At this time I would like to renew the motion for judgment of acquittal based on the following grounds:

(1) That there was no evidence to show that the defendant is guilty as charged in the indictment. On this particular ground I would like to renew the Court's attention to the case of United States versus Rice, 281 Federal 326.

The Court: Is that something you have already cited?

Mr. Barwick: Yes, your Honor. That is the case having to do with the customary practice in mailing within a government office and the testimony necessary to establish proof of mailing. I believe the Court did look at that case in chambers.

That is the only case, your Honor, that I have been able to find on this particular point. The burden of proof, of course, is on the government to show that the notice to report was mailed. As the Court well remembers, there was very little evidence at the trial as to whether or not there was [158] a usual custom or practice in the office. There was absolutely no evidence that this particular card was mailed. The jury had to rely entirely upon a custom. There was no instruction given by the Court that the law says that there is a custom or that the government, in a criminal case, is entitled to rely on the presumption of regularity in administrative acts. The jury merely had to speculate and guess that this card got mailed. Under the rules of the Rice case, more than mere speculation is required. That particular case—and it is the only case I could find in the federal courts on the point—spells out quite emphatically that you either have to have the employee who mailed the letter there to testify that it was mailed or that the employee must testify that it was his or her duty to always mail such letters; and that they always did mail such letters and put it in a specific box.

The Court: Give me that citation again.

Mr. Barwick: 281 Federal 326.

The Court: 281 Federal 3—what?

Mr. Barwick: 26.

The Court: The name of the case?

Mr. Barwick: It is United States versus Rice.

It is cited in——

The Court: What is the date of it?

Mr. Barwick: I believe it is 1922, your Honor.

The Court: Get me that. [159]

Mr. Barwick: It arose out of the draft in World War I. And at the time I read the case I was wondering whether or not there was the provision in there similar to the provision in this case: That notice mailed is good notice. In other words, once it is put in the mail, whether you receive it or not, it is good notice. And they had a similar regulation at that time, too, and the court didn't discuss it.

The second ground for motion for judgment of acquittal is that the government has wholly failed to prove a violation of the Act and regulations by the defendant as charged in the indictment. The government in this case has taken two swipes at the defendant: One, they claim that the notice was mailed, he got it, and he ignored the order. The evidence that he got it was most inconclusive. In fact, the uncontradicted evidence showed that he couldn't have possibly received it. The building to which it was mailed was gone. It was never returned to the government. The defendant testified he left no forwarding address, because he expected no more mail at that address; and this in light of the fact that he had mailed his forward-

ing address to the draft board. So, the undisputed evidence shows that the defendant never received it. In addition, the evidence shows he never received his 1-A card. If the defendant had received his 1-A card, he would have appealed that 1-A. He claims that he was entitled to a 4-D classification. Right on the card it tells you you have [160] ten days to appeal. The defendant knows this, because he appealed once before. It only seems reasonable to believe that if he got the 1-A card at the same address the order went to, he would have appealed. The very fact that he didn't go down and appeal his 1-A would substantiate the fact that he didn't get the order to report; because they were both mailed to the same address within a thirty-day period.

Now, the second swipe that the government has taken at the defendant is based on a continuing duty to report theory. I contend that there is no such duty to report, unless the defendant actually knew that there was such a regulation; and then, he had the intent to violate that regulation. The government never asked the defendant. There was never any evidence in the trial to show that this defendant knew he had this continuing duty. There was no presumption that he knows the law; no such instruction was given to the jury. In other words, the jury merely speculated on the question. Now, he saw the order; he must know he has got to report. But the jury should not be entitled to speculate, your Honor. The government must show by the evidence that this man knew he had a duty

to report. The very fact that he wrote two letters to the draft board would indicate he didn't know what he was supposed to do. And, in his own testimony—I am not contradicted by the clerk of the Board—he asked her what he was supposed to do. And he still wasn't told. This does not [161] sound like a man who knew that he had a continuing duty to report.

The Court: May I ask you this question?

Mr. Barwick: Yes, your Honor.

The Court: Why should he ask the clerk when he had an attorney whom he was consulting? The evidence showed he had consulted an attorney. There is no provision requiring the clerk to give him legal information. Doesn't this involve a legal situation?

Mr. Barwick: There is no duty required by the clerk to tell him he had a continuing duty to report. However, there is a duty on the government to make every effort to locate the man once he is delinquent. And the draft board file shows that, although they knew the address of the parents, they made no attempt to contact this man for almost a year after he was delinquent.

Now then, as to the man's having an attorney, that is true in the first case in 1955, he had an attorney; but, when that case was dismissed, he no longer had an attorney. That was in Los Angeles.

The Court: Why was it dismissed? It wasn't developed in this case. I am wondering what happened to that first case.

Mr. Barwick: In that case, your Honor, the

man was classified 1-A. He filed a C. O. Form for conscientious objector. [162]

The Court: You mean the defendant here?

Mr. Barwick: Yes, the defendant. He was classified 1-A. He had filed a Conscientious Objector Form. A report was mailed by the F. B. I. He was never given the F. B. I. report to look through it, so at his hearing he could rebut the evidence within the F. B. I. report.

The Court: It was failure to give him the F. B. I. report?

Mr. Barwick: Yes. Under the Supreme Court decision pending at that time — in other words, almost all the local cases were held up that were on that point until the Supreme Court decided it was a violation of due process not to give him the F. B. I. report. Since he didn't get it, his case was dismissed.

The Court: That was for violation occurring — what date was the first case?

Mr. Barwick: The first case, he refused to submit to induction in 1954.

The Court: 1954. And the case was dismissed when?

Mr. Barwick: In June of 1955, or July. The Supreme Court case was decided in June of 1955.

The Court: And this prosecution was begun when?

Mr. Barwick: In 1957, in August.

The Court: 1957.

Mr. Barwick: So, in June of 1955, he had an attorney, [163] but that case was over with.

The Court: The only point that you have then is the failure of this defendant to receive the card, and receive the notification?

Mr. Barwick: He failed to receive notice, and he was unaware that there was a continuing duty to report.

The Court: He was unaware?

Mr. Barwick: Yes. There was no evidence in this trial that he knew. The government never asked him did he know. In fact, your Honor, he didn't know. He didn't know two weeks before.

The Court: Isn't there evidence that the F. B. I. man told him something?

Mr. Barwick: No, your Honor. The government's attorney in his argument said that, but the testimony at the trial was this: The government attorney told him, "You are delinquent because you have failed to keep the Board notified of your address." That was the testimony. Now, to substantiate that testimony, we have the following act: The next day he wrote a letter to the Board. In that letter, the first thing he told them was: "My new address is * * *" Because that is what the F. B. I. man had told him: "You are delinquent because the Board doesn't know where you are." And that letter is in the file.

The Court: Is there any evidence fixing definitely [164] the date that this building was torn down?

Mr. Barwick: Yes, your Honor. Mr. McManis testified that in February of that year the building was being demolished. That in March the building

was completely demolished. And the used car lot next door took it all over for parking. In fact, your Honor, off the record, Mr. McManis wired the owner of the car lot just before the trial and received a telegram that there was no building there; that it was for parking. Of course, that is not evidence.

The Court: Is there any evidence to the whereabouts of the defendant at the time it was torn down?

Mr. Barwick: Yes, your Honor. The testimony showed that he was back in San Diego; that he had left; that he left Modesto and — were you in San Diego or Los Angeles?

The Defendant: San Diego.

Mr. Barwick: Oh, yes, your Honor, he was. He had a San Diego address at that time, because he left in February of 1955.

The Court: Left where?

Mr. Barwick: Left Modesto.

The Court: And in February of 1955, at that time the building was in the course of being destroyed?

Mr. Barwick: Yes.

The Court: And he left knowing that. There is nothing in the evidence to determine that. [165]

Mr. Barwick: No, there was no evidence. He didn't know the building was being destroyed. His employment was terminated there, so he left. There was another witness that knew this building was being destroyed, because he was still in Modesto. But this man didn't know the building was being destroyed.

The Court: You say he was in Modesto at the time the building was being torn down?

Mr. Barwick: The other witness was. Not this man. This man didn't testify about the building's being torn down. He didn't know. He didn't find out that until——

The Court: When did he leave Modesto?

We are not trying to inject some new evidence in the case.

Mr. Barwick: No.

The Court: I am just trying to refresh my recollection.

Mr. Barwick: He said January he left Modesto, your Honor.

The Court: Is that in the evidence?

Mr. Barwick: I don't recall whether it was asked. It probably is, your Honor, that he left in January. And the other witness testified that in February the building was commenced being torn down.

Now, the jury under that evidence, I don't see how [166] they could possibly find that the man received his card, particularly in light of the fact that the 1-A card went to the same address; and that had the defendant gotten it, he would have gone down to his Board the next day to appeal.

The government knew where he was, your Honor, at this time, because he was out on bail. Weren't you?

The Defendant: Yes.

Mr. Barwick: He was out on bail at this time, because the other case was pending. The United

States Government had no trouble finding him when they wanted him, because the first case was not decided until June. And in February, he left Modesto. So that the government, the United States Marshal, had no trouble finding him. When he wanted him, all he did was pick up the telephone and find his parents and say, "Tell Mr. Venus to get down here."

The Court: Let's see. The indictment is dated what day?

Mr. Duncan: August 8, 1957, your Honor.

The Court: Let's see. The evidence shows that he was in the office of the selective service board in April of 1957, and he looked through the file.

Mr. Barwick: That is correct.

The Court: And made copies of it; that is correct.

And that is the time that it was stated he asked the clerk what to do; is that right? [167]

Mr. Barwick: Yes, your Honor.

The Court: What did he do following that date, April the 7th, and before the filing of the indictment?

Mr. Barwick: After that date, your Honor, he did nothing except wait for the government to tell him what to do. That is what he was told. In other words, the clerk of the Board told him, "It is out of our hands. We can't do anything." So he just waited to find out. He had done all he could do. He went down to the Board and asked them, "What should I do?" And they didn't tell him anything.

That is where a person is supposed to go when they want to know something about their draft status.

The Court: I take it from your argument—of course, we are arguing the legal questions involved.

Mr. Barwick: Yes, your Honor.

The Court: That no matter what would have happened, he would have refused to have been inducted; is that right?

Mr. Barwick: Definitely, your Honor.

The Court: In other words, wouldn't that be an administrative matter rather than a matter for the Court as to his classification? Now, you are trying to work out a classification here that you think he is justly entitled to.

Mr. Barwick: No, your Honor. I am trying to show the Court that this man has not violated the law; that he didn't wilfully refuse to report. He would have reported. [168] That is true he reported before, but he would not submit.

The Court: The sum and substance of that argument is: Even though he claims he did not violate a law, he still was not willing to be inducted?

Mr. Barwick: That is correct, your Honor.

That is correct, but there is one small thing in between: If this man is acquitted, the Board will be forced to send him a 1-A. At the time they sent him the last 1-A, under the ruling in *United States versus Dixon* he is entitled to a 4-D classification; and he can substantiate that before the Board. Now, the Board, by sending him the 1-A—he didn't get it—they know about the *United States versus Dixon*, and they know what is in this man's file in support

of his claim of United States versus Dixon. And he can establish now that he is entitled to a 4-D. The United States Government was very generous in saying, "We will dismiss if this man will only submit." But they aren't generous enough to say, "We know he is entitled to a 4-D. We will send him another 1-A for a year."

The Court: He never had claimed any status prior to his first registry? When he registered, he registered the same as anybody else, is that right?

Mr. Barwick: That is correct, your Honor.

The Court: He didn't make any claim at that time?

Mr. Barwick: Not at that time, because he wasn't [169] entitled to it. But the man has since. Since early 1955, this man's status has changed.

The Court: What is the provision of the law in that respect, so far as the duty of the selective service board is concerned?

Mr. Barwick: The selective service board must consider any new evidence that is offered into the file and review the classification and determine whether or not, under the new evidence offered, the defendant is entitled to a different classification. Now, that is the law. But as applied to Jehovah Witnesses, it works this way: The minute they make a claim for any other status than 1-A, the Board turns them down, expecting them, knowing full well they will come in and appeal it; because that gives the Board the opportunity to use the services of the F.B.I. in determining whether the defendant is conscientiously opposed to war. The F.B.I. then makes

a complete report. And the practice of the local boards is to let the Appeal Board determine whether or not the defendant is entitled to a claim other than 1-A; because they get this full report that they are not entitled to at the local board level.

The Court: Suppose that he actually had been inducted. According to your theory, he would have had the right to change his classification right then and there?

Mr. Barwick: Actually been inducted? [170]

The Court: Yes; after his induction?

Mr. Barwick: No, your Honor, he can never change his classification unless he appeals within the ten-day period. That is the whole crucial thing: If this man had got the 1-A card, he would have been down there within the ten days, because, if he let that ten days go by, he is dead, he is administratively. He hasn't followed all the administrative steps, and, as the Court well knows, if you fail to follow one administrative step, the Court cannot help you. No matter what you can prove, you have got to take your administrative steps.

The Court: We will take a look at this case of United States versus Rice for a minute.

(Pause.)

The Court: Isn't there a notation on the minutes of the proceedings of the Board that this notice was mailed?

Mr. Barwick: That is correct, your Honor.

The Court: What about that?

Mr. Barwick: If the Court will recall, on cross-

examination I asked the clerk of the Board when they made that notation. She made that notation when they put the letter in the box in the office.

The Court: Can we go behind those minutes?

Mr. Barwick: I don't see why not, your Honor.

The Court: Isn't there a record? Isn't that a part—— [171]

Mr. Barwick: That is part of the record, but the direct testimony of the witness can always amplify or clarify what the record means.

The Court: I can't quite reconcile the last two paragraphs of this opinion, Page 335, with what you say the law to be with respect to the mailing, if I read this correctly. I take it that when this opinion says, Page 335, "Here the important facts are established by circumstantial evidence in the most complete and explicit way"—of course, there is considerable quoting from *Corpus Juris* and other authorities of other cases. And Justice Hutcheson quotes from some of those authorities. But the syllabus, unless you read the entire case portion of it, seems to be based on some of the quotations rather than the case itself here; the law of the case being established by this decision.

I take it this is the opinion of the Court, the: "Here the important facts are established by circumstantial evidence in the most complete and explicit way: (1) There was an office, the sole duty of which was to check delinquents; (2) this office was organized with the utmost care to accomplish the purpose intended; (3) in preparing notices to delinquents the originals and carbons were always pre-

pared at the same time, with their date for mailing written on them; (4) that they were kept together, and were together sent to the Adjutant General, where the original was signed by him [172] and the two returned to the office; (5) that here they were separated, the carbon then and only then going into the permanent file, the original in the mail; (6) that there was a carbon copy of the notice to Helmecke made on November 9, in the Helmecke file; * * *

That probably refers to the other cases cited in this Rice case, is that correct?

Mr. Barwick: I believe.

The Court: The Helmecke case is another case. (Continuing:) “* * * (7) that provision was made to have these letters placed in the mail; and (8) that they were uniformly so placed.

“The detail of the wealth of these circumstances shows that the evidence now offered is not only sufficient to support an inference that the letter in question was prepared and mailed, but in the light of reason is not reconcilable with any other inference. I am therefore of the opinion that the fact upon which the authority of the court-martial rests, to wit, that the induction notice was mailed to Helmecke, has been established absolutely, affirmatively, and unequivocally, and that the writ of habeas corpus applied for should be denied; and it will be so ordered.”

This is the United States versus Helmecke. He is the one that is involved in this case. I thought there was another case. [173]

Mr. Barwick: I guess Rice is the commanding officer.

The Court: This is United States ex rel. Helmecke versus Rice, Post Commander, etc. Helmecke is the litigant in this case?

Mr. Barwick: Right. In that particular case, your Honor, the court did point out, though, what was necessary to establish the mailing.

The Court: Yes.

Mr. Barwick: And it pointed out that you either got to have an employee there who customarily and regularly did it, and that employee must testify as to the steps they took. Otherwise, the court points out there is no evidence. But in this case the testimony is repeated, or right in the opinion. The testimony of the clerk is right there as to what they did and how they were instructed to do it in our opinion case. We have nothing. We are merely guessing that ordinarily letters that are addressed go out in the mail. That isn't enough to send a man to prison in a criminal case. In a civil case you might have some authority for saying that, "Well, a person stamped and addressed it. It probably got mailed." But, even then, by experience we know that things stamped and mailed don't always get sent in the mail. Consider the number of husbands that come home at night with letters still in their pockets.

The Court: In this case, apparently, the proof was [174] made by custom.

Mr. Barwick: That is correct, your Honor.

The Court: In the Helmecke case.

Mr. Barwick: Overwhelming custom.

The Court: But custom. But I am looking for the portion which says that the man, the clerk, who actually mailed, did so. I don't see that in there.

Mr. Barwick: No. The court pointed out you either have that or the testimony of the clerk who performed this custom. As I recall in this case, there is a section in there that tells about the clerk who performed the custom, and that clerk was on the stand and testified what they did, and how she was instructed to do it. And the court found that because of this testimony of the clerk who ordinarily performed it—and she testified as to what her instructions were, and that she always carried them out in this way—but there was enough circumstantial evidence to show that in this particular case, even though she couldn't actually remember mailing this correspondence, there was circumstantial evidence of mailing.

The Court: The case cites: "In the course of the cross-examination it was made plainly to appear that Adjutant General Harley knew none of the facts that he had testified about of his own knowledge; that he testified only from records; that he identified the photostat copy, because it was a copy of the regular form used, and that his testimony that the [175] original was mailed to Helmecke was based entirely upon the custom of his office; that he knew nothing personally about the mailing, or about the making of the original notice; that he had no personal knowledge whatever about any of the matters testified to, and that his testimony was simply from his general knowledge of how the affairs of

the office of the Adjutant General were conducted; that he had no personal knowledge, nor did he ever have any personal knowledge, of the military status of the defendant, Helmecke, but that he testified from his knowledge of the rules and regulations made and established by the Provost Marshal General for the conduct of the draft, which were followed very carefully. He stated specifically that he did not mail the notice, that he did not know who mailed it, that he did not make out the notice himself, and that he could not state who made it. He further testified that he had no personal recollection with reference to the notice; that he did not sign all the notices that were sent out; that it was his understanding that all copies sent out and all notices issued were signed, or sent under his direction."

Then, on Page 329, it goes on: "It is therefore evident that the single question in this case is whether or not the evidence shows, in that clear, unequivocal, and certain way, that the jurisdictional fact, to wit, that the notice was mailed to Helmecke, has been established." Then there [176] are some cases cited. Then the language further recites: "In all those cases it was conceded that notice was mailed; the mere question was whether it was necessary to prove that it had been received, and, if so, whether the evidence sufficiently showed the receipt. Here, if the notice was mailed, Helmecke was inducted; if it was not mailed, he was not inducted. The determination of this single question, whether the evidence shows the mailing, determines whether

the application of the relator shall be granted or denied.”

Apparently, there is a rehearing in this case from the original hearing. There was a subsequent rehearing. This matter was before the court at a previous hearing. “It was then held that the testimony offered in the court-martial proceedings and submitted on the application for the writ, which consisted of no direct evidence that the notice in question was actually mailed, but merely of photostat copies of the reports made and the notice claimed to have been issued in the Helmecke matter, together with the oral testimony of the Adjutant General * * *”

Then, there was additional testimony offered. And also Brophy, the mailing clerk here, apparently testified as to the custom of handling the mail, and so forth.

Mr. Barwick: That is correct, your Honor. That is the particular point wherein this case before us is lacking.

The Court: There was testimony in this case as to custom, too. [177]

Mr. Barwick: She was not the mailing clerk, your Honor. She was just the general clerk of the Board. She testified that someone else took the mail.

The Court: She testified the custom was for this mail to be deposited in the receptacle, and the mail clerk could then pick it up and mail it.

Mr. Barwick: Yes, but under the case, your Honor, the mailing clerk should be there to testify

how she did it, under what circumstances, what her instructions were.

The Court: And, apparently, this custom that he testified to, that after the mail was deposited in the pouch which hung at his desk, this clerk, this mailing clerk, and of causing the mail to be carried to the post office by Tom Brown for mailing. I don't know whether Tom Brown testified. I don't think he did in this case. And he was the one who actually mailed it, Tom Brown, the mailing clerk. Tom Brown did testify that he had been a porter for twenty-three years, and he also testified as to the custom. But there was no direct testimony that anybody mailed this particular piece of mail. It all came through the custom of the operation.

Mr. Barwick: That is correct, your Honor.

The Court: Although, they had a little more evidence than there was in this case. They had evidence of the mailing clerk and the fellow that carried the mail to the post office.

Mr. Barwick: Yes, your Honor. [178]

The Court: But all he testified to was to the custom.

Mr. Barwick: That is right.

The Court: All he testified to was the custom.

Mr. Barwick: Yes.

The Court: Can you analyze this case any differently?

Mr. Duncan: I don't see what difference it makes as to who testifies to the custom, your Honor. You have got the same testimony in this case you had in that case.

The Court: It is more refined in this case; the connection was a little more direct as to the custom. Here we have the testimony as to the custom only from the clerk of the Board.

Mr. Duncan: We have got additional testimony, additional evidence here, your Honor, with a notation made in the file. I think your Honor has to consider all of those things. I think the testimony in this case is every bit as strong as the testimony in that case. This is the first time I have known that the case has gone the way it has gone, as counsel has cited it, the proposition that the evidence was insufficient. As I understand the case, it held the evidence was sufficient.

The Court: I beg your pardon?

Mr. Duncan: This case held——

The Court: There was on the rehearing.

Mr. Duncan: I think the evidence here is every bit [179] as strong as there, your Honor.

Counsel is urging, as a matter of law, that there was insufficient evidence here to go to the jury, and I think the Court is entitled to consider all of the evidence. Now, in this case, the controlling thing in this case was the mailing; and in our case here there was all this other evidence that the Court was entitled to consider about whether or not there was sufficient evidence to go to the jury.

The Court: The court used pretty strong language here based on custom rather than actual mailing of the particular piece of mail. The court says: "I am therefore of the opinion that the fact upon which the authority of the court martial rests, to wit,

that the induction notice was mailed to Helmecke, has been established absolutely, affirmatively, and unequivocally; * * *”

Mr. Barwick: That is correct, your Honor. But in that case there is far more testimony than we have in this case. The clerk in a couple of sentences testified: Well, she put it in the box, and someone took it out and mailed it.

If the government means that that is the same as the Rice case, I fail to see the connection. In the Rice case they specifically laid out step by step. There could be no doubt as to what took place in that office.

The Court: The only steps that were taken were steps by custom, according to the testimony. [180]

Mr. Barwick: That is correct. I am not urging that the government in every case has to get the employee to testify “I saw the letter, and I saw it addressed, and I put it in the box.” That is an impossible burden. But it is incumbent upon the government, under the Rice case, to do more than just say, “We usually mail the letter, and we usually put them in that box, and someone takes them out.”

Mr. Duncan: Counsel is arguing about who has to testify as to custom. That is his whole point. And what difference does it make who testifies to the custom? The testimony is the thing that counts, not who testifies to the facts.

The reason for these presumptions and for hearsay exceptions is that in exactly these situations we have to rely on custom, your Honor. What individual that carried the mail from one box to another

would remember this specific day and what he had done? It is just impossible. The clerk testified that she had prepared it, that she put it in her out box, that she stamped the fact on the file, that she had mailed it. She also testified that she prepared the duplicate order, and then, on cross-examination, she went completely into the custom. And counsel is saying there is no evidence in the record whatsoever to indicate that it was mailed.

Mr. Barwick: According to the Rice case, as I read it—and I took it out of the case—it says: There must be [181] testimony of the employee whose duty it was to deposit the mail in the post office. There must be testimony.

Now, it says——

The Court: But there wasn't any more than the custom.

Mr. Barwick: That is true. Now, it goes on to say she must testify, the employee, she actually deposited it or it is her invariable custom. But here we don't even have the employee whose duty it was to deposit it in the mail box.

The Court: I don't see how three or four people who carry out a customary procedure, if it is all based on a matter of custom, would minimize the testimony of a clerk who customarily did this and did that; and she placed it in an envelope and properly addressed it, placed it in the receptacle; and that it was custom for the mailing clerk to take it to the post office; she made note of it in the record. Had the mailing clerk also testified, he couldn't have testified that this piece of mail was in there.

Mr. Barwick: No, your Honor. But under the Rice case, all he has to do is to get up there and tell that he usually does it, how he usually does it. After all, we can't speculate on what he is going to testify. We can't say he is going to testify to help the government or to help the defendant. That is why we want him on the stand.

The Court: I think the trouble was in this other case, this Rice case, that the Adjutant General—wasn't it in this Rice case? [182]

Mr. Barwick: The Adjutant General merely testified——

The Court: However, the Adjutant General testified he knew nothing about it, about the matters that were important in that case; that he was just testifying more or less from what he was told and what he knew generally.

The language says: "In the course of the cross-examination it was made plainly to appear that Adjutant General Harley knew none of the facts that he had testified about of his own knowledge; that he testified only from records; * * *" and so forth.

Here we had the clerk who testified that she kept the minutes; she made those entries; and that she did the mailing. That is to say, she did the addressing. She had to do with the mailing of the notices, and that the notices were deposited in the proper receptacle; and there was a custom and usage for that to be taken out daily, or more often—I don't know—but, at least, daily, and by the mail clerk who

redeposited the United States mail; and that was the custom and usage. And it had prevailed and still prevails. That is the gist of her testimony.

Mr. Barwick: That is correct, your Honor.

Mr. Duncan: She was a recipient witness. And that is all that case is asking for, your Honor. The Adjutant General there wasn't a recipient witness, and they had to supply that missing link. We put a recipient witness on the stand. [183]

Mr. Barwick: That indication goes further than just any witness. It actually says it must be the testimony of the employee.

The Court: I think this case can be differentiated to some extent from our case. I think here we have a pretty fair record of what happened insofar as the records of the Board are concerned and the handling of the records and all of the details.

Mr. Barwick: I would like to continue then and specify another ground. The Universal Military Training and Service Act, as construed and applied by the regulations thereunder, and, more particularly, Section 1642.2 of the Selective Service Regulations, is unconstitutional.

The Court: I have read your motion.

Mr. Barwick: Oh.

The Court: You are reading now from the motion?

Mr. Barwick: I am rereading the motion, your Honor.

The Court: Yes. I don't think it is necessary to reread it. As I recall, it attacks the constitutionality of the Act.

Mr. Barwick: Yes.

Now, I would like to point out, your Honor, that under that particular regulation this situation could apply, and I contend it happened in this case: The Board can make out a notice; they could lose it, never mail it. Or, if they [184] did mail it, the defendant never received it. Yet——

The Court: There are other facts in this case as to presumptions, other elements of this case than presumptions.

Mr. Barwick: Presumptions as to what?

The Court: As to knowledge.

Mr. Barwick: The man is presumed to know the law?

The Court: In this case, the defendant here went to the office himself and had the records and looked at them. And if there is anything wrong with them, he could have—that is before the time of the indictment——

Mr. Barwick: Yes.

The Court: ——he could have made his wants known there. Instead of that, he said, “Well, what will I do?” What a question to ask of the clerk of the Board: “What shall I do?” That is a legal question, purely a question for a lawyer to answer; a matter, even if she had told him, it wouldn’t have bound the Board. It wouldn’t have had anything to do with what the regulations require. It is merely a matter of information. Suppose she gave him the wrong information. Supposing she said, “Well, you just forget about it.” Would you think he would rely upon that information?

Mr. Barwick: Legally, he probably couldn't. But, your Honor, how many times does the average citizen go down to an administrative agency or government agency and they ask the clerk at the counter for the information? They expect that [185] a person who is working for that agency knows the rules and regulations or, at least, will send them to someone who does know. This defendant came down there in good faith. He wanted to know what he was supposed to do. Now, the ultimate fact that he would not submit to induction has no bearing——

The Court: You are probably right in that respect.

Mr. Barwick: Because he went once before knowing he wasn't going to submit.

The Court: There is another element we musn't overlook. The jury can believe or disbelieve any person. I don't know what goes on in the jury room. That is their business. But, apparently, the jury believed the testimony that was supplied by the government's witnesses.

Mr. Barwick: There was only one government witness, and all that clerk testified to was the fact the notice was sent.

The Court: Yes.

Mr. Barwick: There was nothing in the government's case to show that the man had knowledge at all.

The Court: You have involved a question of fact there. You rely upon the fact that the mail could not have reached the defendant because the building was torn down. The clerk testified there was no mail re-

turned. If it had not been delivered, we know, as a matter of fact, that the mail comes back to the sender, particularly this kind of mail. [186]

Notices of that kind are usually registered, are they not?

Mr. Barwick: No.

The Court: Certified?

Mr. Barwick: No. They are sent by plain government frank.

The Court: What mail is certified and registered? There is some testimony here in this case.

Mr. Duncan: That was the change of addresses, your Honor, sent by the defendant to the Board. But the Notice to Report for Induction wasn't sent out by registered mail.

The Court: No.

Mr. Duncan: I might point out, your Honor, though, as I told the jury, in order to believe the defendant's story—there are three pieces of mail here which were lost in the mail, all of them crucial to this case. You have to believe that three pieces of mail ran astray. And that is just hard to believe.

Mr. Barwick: Yes, counsel did point that out to the jury. But the funny thing is one of those three pieces—this man wouldn't be in court today if he got it. And that is the 1-A classification card; because he would have gone down to the Board and appealed it, and we would have no case. He would have had the 4-D, or he would have had a chance to the 4-D he is entitled to, or thinks he is entitled to. [187]

Mr. Duncan: That is a question of fact, and the jury made a determination on that.

Mr. Barwick: Yes. In other words, your Honor, the jury determined that he got two of the pieces, but he didn't get the third.

The Court: It probably might be. I don't know. I don't know what the jury determined. It must have determined something along that line; otherwise, they would have believed the defendant.

Mr. Barwick: To continue with my argument on the motion for acquittal: Under the government's theory, a draft board can make up a notice, stamp it "Mailed," according to the testimony, and it could be lost or destroyed. It might never get mailed. But in their records it says, "Mailed it; been made up." Then, the defendant never knows about it; and then, he comes down to the Board one day and goes through his file, maybe a year or two later, and says to the clerk, "Oh, I see I have been ordered to report. What do I do now?" And the clerk says nothing to him. She says, "It is out of our hands." And he goes away. Under the regulations, he may have a duty to report, but under the very same regulations the order has never been sent. It is my theory, your Honor, that the regulations are inconsistent; because under 1642.2, it is requiring the defendant to report for induction, whereas, in fact, the Board may never have sent the order to report. And by——

The Court: How about the presumption existing? We have got to take that for some value. There is a presumption that if a letter is mailed, addressed, and stamped—in this case it didn't need to be stamped—there is a presumption that it has been

delivered; is that right? Isn't that a legal presumption?

Mr. Barwick: There is a legal presumption, your Honor, that a letter properly addressed and mailed and sent to the addressee, and the addressee lives at that address, has been received.

The Court: All right.

Mr. Barwick: There is a case on that, and I ask——

The Court: The letter was mailed, from the records and from the testimony, to an address which is the last address known to the Board as far as the record shows.

Mr. Barwick: That is correct. But that isn't what the presumption is.

The Court: You and I can't change the facts as they were developed at the trial of the case. We can't change the circumstances surrounding this entire transaction. We have to take the record as it stands.

Mr. Barwick: That is correct. But there arises the presumption of fact that the addressee of a letter received it. It must first be proved it was properly addressed.

The Court: Pardon me just a moment.

(Off the record discussion.) [189]

Mr. Barwick: But no set presumption arises unless it appears that the person to whom sent resided at the place to which it was mailed. And there are two Federal citations for that proposition, your Honor. In other words, that presumption doesn't arise in this case, because he didn't reside at the

place it was sent. So the government, under the regulations, can never send a letter and yet, at the same time, can hold a man guilty because he has this continuing duty to report. I contend that this regulation is unconstitutional, because it does deprive him of due process of law. He can't ever go behind it and say, "Well, you didn't mail me the regulation." The government has relied on the regulation you have to report regardless whether we mailed it.

That is all I have with respect to the motion for judgment of acquittal, your Honor.

The Court: The motion is denied.

Mr. Barwick: And now, on the motion for new trial: The same arguments that were presented in the motion for judgment of acquittal are presented in the motion for new trial with the addition that the Court erred in charging the jury and refusing to charge the jury as requested. Namely this: The defendant requested that an instruction be given on mailing; namely, Defendant's Number—just one moment.

The Court: I think we covered that pretty well in our discussions in chambers. [190]

Mr. Barwick: Yes.

(Continuing): —Defendant's Number 12.

The Court: Yes.

Mr. Barwick: That was requested.

Now, under the evidence, your Honor, as presented, the jury, under this instruction, could have found that the defendant never received the 1-A

or the order, because he had shown that the building wasn't there. They could have believed him.

The Court: They could have found it, too, based on the evidence if they had seen fit to do it. They didn't. They didn't need any instruction. He testified directly on that subject matter.

Mr. Barwick: Yes, correct. But the defendant also testified that he mailed a card with his new address to the Board. If this instruction had been given, the jury could have found that that letter was received, because it meets all the requirements of the presumption. And, if in fact, the jury had been instructed to that effect, they could have found the notices sent to him were not received because of the direct testimony and relying on the presumption the defendant's notice was received by the Board and the Board failed to send the card to his last known address; that, in fact, the Board didn't receive them because of this presumption and has failed in its duty. Under the regulation, the Board is required to send a [191] notice of classification to his last known address. And for that reason, I submit that a new trial should be granted. In reviewing the evidence under a motion for new trial, as the Court is well aware, it sits more or less as a thirteenth juror. Whereas the Court might waive a presentation in favor of the government for a denial of a motion for new trial, I feel there are many things in this case which are too weak for a reasonable, fair-minded person to consider in substantiating the government's claim.

Thank you, your Honor.

The Court: The motion is denied.

Mr. Barwick: At this time, your Honor, is it appropriate to make a motion to continue the defendant on bail pending the filing of a notice of appeal?

The Court: You will have to have a judgment of the Court first, won't you?

Mr. Barwick: Oh, I'm sorry, your Honor. That is why I asked if it were appropriate.

The Court: Let's see.

(To Bailiff): Will you look on my desk and get the probation report?

We will take a few minutes recess; about ten minutes.

(Short recess taken.)

The Court: This is the time fixed for sentence in the case before the Court. [192]

Certificate

I hereby certify that I am a duly appointed, qualified and acting court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing Pages 1 to 203, inclusive, are a true and correct transcript of the proceedings had in the above-entitled cause on November 13, 14, 15, 1957, and on December 2, 1957, and that said transcript is a true and correct transcript of my stenotype notes.

Dated at San Diego, California, this 10th day of February, A.D. 1958.

/s/ MALCOLM E. LOVE,
Official Reporter.

[Endorsed]: Filed March 14, 1958. [204]

[Title of District Court and Cause.]

DOCKET ENTRIES

- 8/ 8/57—Ent. ord. & fld. Indict., bond fixed at \$2,500. Ent. ord. for issg. B/W. Issd. B/W to Mars. Md. JS-2.
- 8/15/57—Fld. \$2,500. Bond, with sureties, posted 8/14/57. (Hocke.)
- 8/21/57—Fld. B/W—Retd. Execu.
- 9/30/57—Ent. proc. arr. TN; K. Barwick, atty.; ent. plea N/G assign J. Weinberger; ent. ord. settg. for jury trial 10/15/57, 9:45 a.m. (JW.)
- 10/15/57—Lodged waiver of jury trial & ent. proc. & ord. allowing withdrawal of waiver. Ent. ord. settg. for jury trial 10/29/57, 9:45 a.m. (JW.)
- 10/29/57—Fld. on 10/28/57 waiver deft's appear. Ent. proc. & order. cont. to 10/31/57, 9:45 a.m. for trial. (JW.)
- 10/31/57—Ent. proc. cont. to 11/13/57, 9:45 a.m. for trial. (JW.)

- 11/13/57—Ent. proc. on impanelmt. jury & jury trial; fld. exhs. & sw. wits.; ent. ord. cont. to 11/14/57 for fur. trial. (JW.)
- 11/14/57—Ent. proc. fur. jury trial; fld. requested instrucs. of plf. & deft.; ent. ord. cont. to 11/15/57 for fur. trial. (JW.)
- 11/15/57—Ent. proc. fur. jury trial; ent. ord. & fld. & ent. verdict G; ent. ord. ref. P/O for I & R & cont. to 12/2/57, 10:00 a.m. for sent., rem. on bd.; ent. ord. for substit. photocopy for Ex. 1 & fld. receipt. (JW.)
- 11/20/57—Fld. not. of intent to move for new trial; Fld. renewal of mot. for judgmt. off acquit.; fld. mot. for new trial. (JW.)
- 12/ 2/57—Ent. proc. hrg. mot. deft. for judgmt. acquittal & ent. ord. denyg. mot. Ent. proc. hrg. mot. deft. for new trial & ent. ord. denyg. mot. Ent. proc. sent deft. 18 mos. & fine \$500; exec. stayed to 12/13/57, 10 a.m.; fld. judgmt. & issd. copies; ent. judgmt. 12/6/57; Md. JS-3. (JW.)
- 12/10/57—Fld. Notice of Appeal of deft. from judgmt., with affid. serv. on U. S. Atty.
- 12/13/57—Ent. proc. & ord. fixing bd. on appeal at \$4,000, to be approved by Judge Weinberger & fur. stay exec. judgmt. to 12/20/57, 10 a.m. (JW.)
- 12/18/57—Ent. proc. & ord. exec. judgmt. fur. stayed to 12/27/57, 12 noon. (W.) Issd. abst. to Mar.
- 12/26/57—Fld. Bond on Appeal of deft. \$4,000.00.

12/30/57—Fld. Prae. and issd. abstract of judgment.

1/14/58—Fld. affid. re extension of time to docket appeal, until 3/15/58. Fld. ord. granting ext. of time re docket of record of appeal 'til 3/3/58. (JW.)

1/29/58—Fld. def't's desig. of contents of record on appeal.

2/24/58—Fld. affid. K. Barwick re extension of time to docket appeal. Fld. Ord. (JW) extending time to docket appeal to 4/3/58. (JW.)

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify the foregoing items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 63, inclusive, containing the original:

Indictment.

Government's Requested Instructions to the Jury.

Defendant's Jury Instructions.

Verdict.

Minute Order, 11/14/57.

Motion for New Trial.

Renewal of Motion for Judgment of Acquittal.

Minute Order, 12/2/57.

Judgment.

Notice of Appeal.

Order Granting Extension of Time re Docketing of Record on Appeal, filed 1/14/58.

Designation of Contents of Record on Appeal.

Order Granting Further Extension of Time for Docketing of Record on Appeal, filed 2/24/58 (copy). Docket Entries.

Amended Designation of Contents of Record on Appeal.

Points to be Relied Upon on Appeal.

B. Government's Exhibit No. 1.

C. One volume of Reporter's Transcript of Proceedings had on: 11/13/57; 11/14/57; 11/15/57 and 12/2/57.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Dated: March 28, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the Supplemental transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 containing the original:

Supplemental Designation of Contents of
Record on Appeal.

B. Reporter's Transcript of Proceedings had on: November 15, 1957.

I further certify that my fee for preparing the foregoing record, amounting to \$0.75, has been paid by appellant.

Dated: April 28, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 15953. United States Court of Appeals for the Ninth Circuit. Carline Constantine Venus, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed March 29, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15953

CARLIN CONSTANTINE VENUS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

POINTS TO BE RELIED
UPON ON APPEAL

Appellant intends to rely upon the points urged before the District Court and will contend that the District Court erred in the following respects:

1. In overruling the objection to the admission of any testimony concerning evidence happening after November 8, 1955.

2. In failing to find an insufficiency of evidence to establish the mailing of the Notice to Report for Induction which support the indictment to the defendant.

3. In failing to find that the verdict of the jury was contrary to the weight of the evidence.

4. In failing to find that the verdict was not supported by substantial evidence.

5. By failing to find that the Universal Military Training and Service Act as construed and applied by the regulations thereunder, and more particu-

larly Section 1641.3 of the Selective Service Regulations, is unconstitutional because it deprived the defendant of due process of law, contrary to the Fifth Amendment to the United States Constitution.

6. In failing to find that Section 1641.3 of the Selective Service Regulations deprived the defendant of procedural due process of law at the trial because it denied the defendant of his right to a full and fair hearing upon the question of whether he actually received the notice requiring him to report for induction.

7. In failing to find the Universal Military Training and Service Act and the regulations thereunder, more particularly Section 1642.2 of the Selective Service Regulations as construed and applied to the facts of this case, are unconstitutional because they deprived the defendant of due process of law, contrary to the Fifth Amendment to the United States Constitution.

8. By failing to find that Section 1642.2 of the Selective Service Regulations deprived the defendant of procedural due process of law at the trial because it denied the defendant of his right to a full and fair hearing upon the question of whether he actually received the notice requiring him to report for induction.

9. In giving Government's Instructions to the Jury Nos. 4 and 7 and in charging the jury over the objections and exceptions to the Court's charge.

10. In failing to give defendant's Jury Instructions Nos. 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25.

11. In failing to grant defendant's motion for judgment of acquittal and the renewal thereof.

12. In failing to grant defendant's motion for new trial and the renewal thereof.

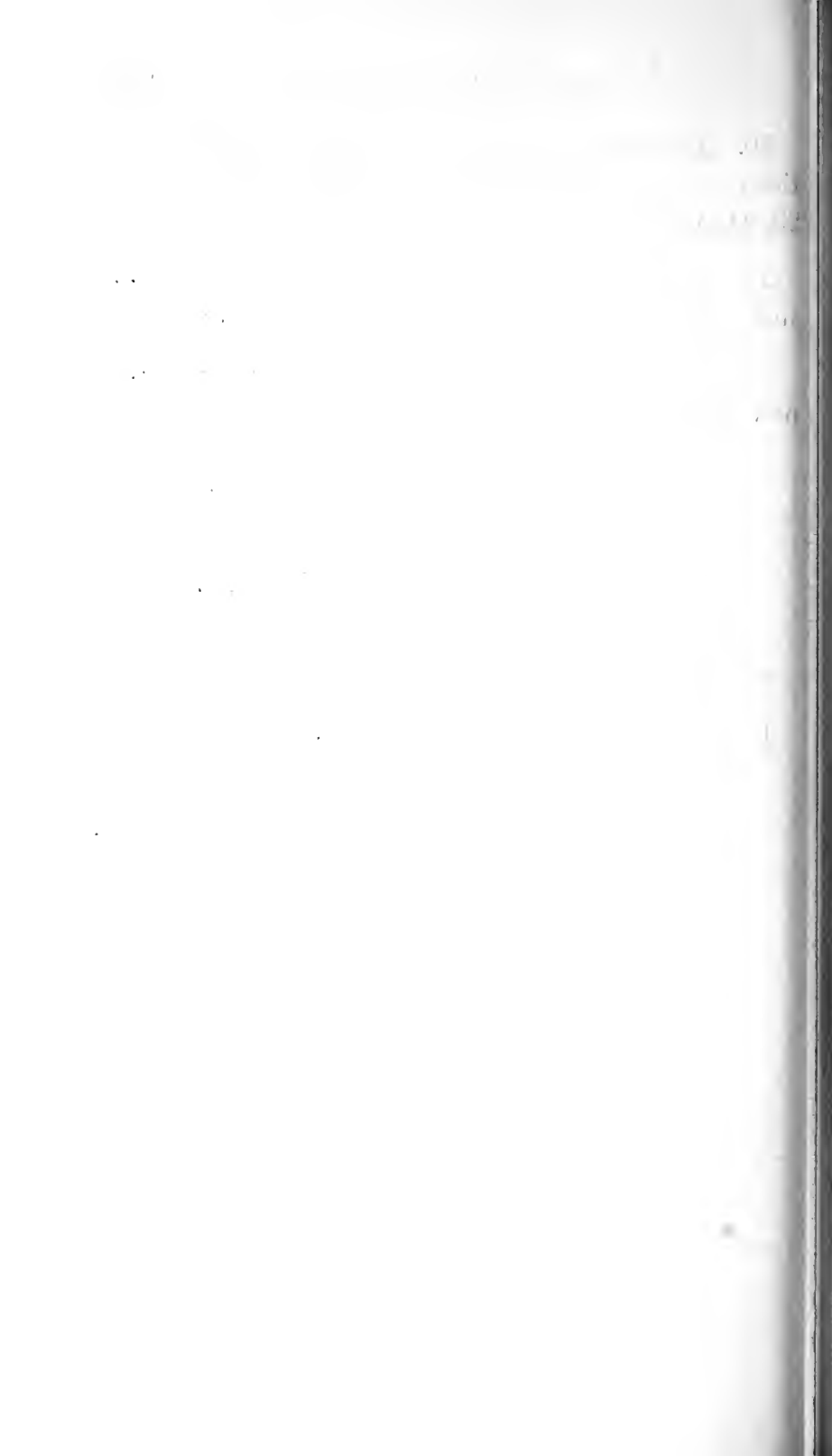
/s/ HAYDEN C. COVINGTON,

KENNETH A. BARWICK,

Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed April 2, 1958.



No. 15953

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARLIN CONSTANTINE VENUS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

**Appeal from the United States District Court for the
Southern District of California,
Southern Division.**

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DAVID B. O'BRIEN, Clerk

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No. 15953

United States Court of Appeals
FOR THE NINTH CIRCUIT

CARLIN CONSTANTINE VENUS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

**Appeal from the United States District Court for the
Southern District of California,
Southern Division.**

JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Southern District of California, Southern Division. (R. 19-22) The District Court had jurisdiction under Title 18, § 3231, United States Code. The indictment charged an offense against the Universal Military Training and Serv-

ice Act (50 U.S.C. App. § 462). (R. 3-4) This Court has jurisdiction of this appeal under Rule 37 (a) (1) and (2) of the Federal Rules of Criminal Procedure because the notice of appeal was filed in the time and manner required by law. (R. 21-22)

STATUTE INVOLVED

Section 12 (a) of the Universal Military Training and Service Act (50 U.S.C. App. § 462 (a)) provides:

“... Any ... person ... who ... refuses ... service in the armed forces ... or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title ... shall upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment. . . .”

REGULATIONS INVOLVED

Section 1602.4 of the Selective Service Regulations (32 C.F.R. § 1602.4) reads as follows:

“Delinquent.”—A ‘delinquent’ is a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law.”

Section 1632.1 of the Selective Service Regulations (32 C.F.R. § 1632.1) reads as follows:

“Order to Report for Induction.”—Immediately upon determining which men are to report for induction, the local board shall prepare for each man an Order to Report for Induction (SSS Form No. 252) in duplicate. The date specified for reporting for induction shall be at least 10 days after the date on which the

Order to Report for Induction (SSS Form No. 252) is mailed, except that a registrant classified in Class I-A or Class I-A-O who has volunteered for induction may be ordered to report for induction on any date after he has so volunteered if an appeal is not pending in his case and the period during which an appeal may be taken has expired. The local board shall mail the original of the Order to Report for Induction (SSS Form No. 252) to the registrant and shall file the copy in his Cover Sheet (SSS Form No. 101)."

Section 1632.14 of the Selective Service Regulations (32 C.F.R. § 1632.14) reads as follows:

"Duty of Registrant to Report for and Submit to Induction.—(a) When the local board mails to a registrant an Order to Report for Induction (SSS Form No. 252), it shall be the duty of the registrant to report for induction at the time and place fixed in such order. If the time when the registrant is ordered to report for induction is postponed, it shall be the continuing duty of the registrant to report for induction upon the termination of such postponement and he shall report for induction at such time and place as may be fixed by the local board. Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuing duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains."

Section 1641.1 of the Selective Service Regulations (32 C.F.R. § 1641.1) reads as follows:

"Notice of Requirements of Universal Military Training and Service Act.—Every person shall be deemed to have notice of the requirements of title I of the Universal Military Training and Service Act, as

amended, upon publication by the President of a proclamation or other public notice fixing a time for any registration. This provision shall apply not only to registrants but to all other persons."

Section 1641.2 of the Selective Service Regulations (32 C.F.R. § 1641.2) reads as follows:

"Failure to Take Notice.—(a) If a registrant or a person required to present himself for and submit to registration fails to perform any duty prescribed by the selective service law, or directions given pursuant thereto, within the required time, he shall be liable to fine and imprisonment under section 12 of title I of the Universal Military Training and Service Act, as amended.

"(b) If a registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege."

Section 1641.3 of the Selective Service Regulations (32 C.F.R. § 1641.3) reads as follows:

"Communication by Mail.—It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not."

Section 1642.1 of the Selective Service Regulations (32 C.F.R. § 1642.1) reads as follows:

"Regulations Governing Delinquents.—Delinquents, as defined in section 1602.4 of this chapter shall be governed by the provisions of this part and such other

provisions of the Selective Service Regulations as are not in conflict therewith.”

Section 1642.2 of the Selective Service Regulations (32 C.F.R. § 1642.2) reads as follows:

“Continuing Duty.—When it becomes the duty of a registrant or other person to perform an act or furnish information to a local board or other office or agency of the Selective Service System, the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act or the supplying of incorrect or false information shall in no way operate as a waiver of that continuing duty.”

Section 1642.15 of the Selective Service Regulations (32 C.F.R. § 1642.15) reads as follows:

“Continuous Duty of Certain Registrants To Report for Induction.—Regardless of the time when or the circumstances under which a registrant fails or has failed to report for induction pursuant to an Order to Report for Induction (SSS Form No. 252) . . . it shall thereafter be his continuing duty from day to day to report for induction to his own local board, . . . ”

STATEMENT OF CASE

Appellant was charged by indictment filed August 8, 1957, among other things, as follows: “the defendant was classified in Class I-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on November 8, 1955, in San Diego County, California, . . . ” (R. 3-4) He pleaded not guilty. (R. 15)

The case proceeded to trial before a jury on November 15, 1957. (R. 15) The Selective Service cover sheet of the registrant was received into evidence as Government’s Exhibit 1. (R. 25, 59) Appellant Venus registered on Sep-

tember 15, 1948. He filled out and returned his classification questionnaire to the local board on May 24, 1949. [4-10]¹ He was classified I-A on July 11, 1950. [11] On October 27, 1950, he was classified III-A. [11] On November 13, 1951, he requested a Special Form for Conscientious Objector. [14] He filed this form on November 19, 1951. [30-51] He thereafter was mailed a revised Special Form for Conscientious Objector on December 11, 1951, which he filled out and returned on December 17, 1951. [11, 52-58] On January 9, 1952, the local board classified him I-A-O, making him liable for noncombatant military service in the armed forces. [11] Following a personal appearance on February 11, 1952, he was reclassified in II-A. [11] He was again classified by the local board in I-A on September 24, 1952, [11] but was reclassified to II-A on October 15, 1952. [11] The local board placed him in Class I-A on January 7, 1953. [11] He timely appealed. [76]

His file was forwarded by the appeal board to the Department of Justice for investigation, hearing and recommendation on February 19, 1953. [80] Following the investigation and hearing, the Department of Justice recommended to the appeal board that appellant be denied the conscientious objector status. [83-88] The appeal board thereupon classified him in I-A on April 9, 1954. [90] On May 4, 1954, he was ordered to report for induction on May 19, 1954. [12, 89] He reported for but declined to submit to induction. [91]

On May 26, 1954, the local board commanded him to appear before it for an informal interview on June 3, 1954. [93] He appeared and informed the board that he was opposed to both combatant and noncombatant military service because of his religious training and beliefs, that he was now a minister and his goal was to become a full-time

¹ Figures appearing in brackets refer to the penciled underlined numbers on material in registrant's cover sheet, being Government's Exhibit 1.

minister or pioneer. He informed the board that he would not perform military training and service. [96-97]

On June 7, 1954, appellant wrote a letter to the local board informing it of a change of address. The letter stated: "At this time I wish to inform you of my departure from San Diego to Modesto, Calif. because of secular employment. The Federal Bureau of Investigation I have notified, when in Los Angeles after induction procedures. My new address is (Same Employer) 1431 10th St. Modesto, Calif., but can be reached within one or two days at my San Diego address." [147] (R. 34, 46, 62)

The Director of Selective Service determined that appellant should be prosecuted. [150] While the case was pending in the court, the local board, on November 2, 1954, sent appellant's file to the Assistant Deputy State Director at Los Angeles, as requested. [157] The Assistant Deputy State Director, on November 26, 1954, sent the file to the State Director at Sacramento. [162] The file was returned to the Assistant Deputy State Director at Los Angeles on January 4, 1955. [166] However the file was not returned to the local board until July, 1955. [166]

Appellant, in February, 1955, while the file was still out of the hands of the local board, notified the local board of a change of address. He mailed a postcard to the local board. He testified that the postcard read as follows:

" 'This is to notify you of my new home address. You can contact me at this address at all times. Please send all mail to this new address as from the date of February—I believe it was February 20th. I am not accurate on that, but it was a February date. I said, 'as of February 20th.' I will say that. I would. 'Please send all mail to this new address: 1120-30th Street, San Diego.' And I signed it, my name: 'Thank you, Carlin Venus.' " (R. 64)

This was at a time when appellant was helping his parents move from one place to another in San Diego. He

was undecided as to whether he was going to continue to live in Modesto or stay in San Diego. (R. 62-63) The new address that he gave to the local board, 1120 30th Street, San Diego, by the postcard above quoted, was his parents' home. (R. 63)

He actually deposited the postcard, notifying the local board of the change of address, in the United States mails. (R. 63-64) The postcard was mailed by him in Los Angeles, where he was temporarily staying. (R. 76) There was a friend with him at the time the postcard was mailed, who went with him to the substation to mail the card. (R. 82) His friend saw him put the postcard in the mail box at the substation in Los Angeles at Sixth and Alvarado Streets. (R. 99) The postcard was a Government-stamped postcard. (R. 100) The friend testified at the trial that Venus, whom he accompanied to the post office, told him "he had to mail a card to his draft board to give them his parents' address to make sure they had a permanent address, because we were working different places." (R. 101-102)

On previous occasions Venus had communicated with the local board by registered mail and several times he used registered mail to notify the board of a change of address. (R. 76-77, 79-80, 91-92) This time, however, he did not register the postcard because he said "I was just dropping the draft board a line to let them know of my new address." (R. 78)

The record shows that there were five or ten communications by Venus with the local board that were not certified or registered mail. (R. 92-93)

The selective service file shows that it was not in the hands of the local board at the time that appellant mailed the February, 1955, change of address. The "Minutes of Actions by Local Board and Appeal Board" shows: "7-11-55 File and SSS Form No. 1 received from So. Area Hdqs. hh", which is the first time the local board had the file after

November 2, 1954. [12, 157, 166] The file was out of the possession of the local board for eight months.

On August 4, 1955, the United States Attorney informed the local board that the indictment was dismissed because appellant had not been furnished with a copy of the Department of Justice recommendation, and permission was given to reprocess appellant. [17]

On September 1, 1955, the local board reclassified appellant to I-A and he was so informed on September 2, 1955. [12] Appellant testified he did not receive such notice of classification. (R. 81) On October 28, 1955, an order to report for induction on November 8, 1955, was mailed to appellant at 1431 10th Street, Modesto, California. [12, 72] It was not mailed to his current address. (R. 33) This address appearing on the order and on the envelope in which it was enclosed, was not mailed to 1120 30th Street, San Diego, the address which appellant had given to the local board in the postcard mailed from Los Angeles. (R. 76) The wrong address appearing on the order and on the envelope in which it was enclosed, was taken from the letter written by appellant to the local board June 7, 1954, notifying the local board that he was moving to Modesto. On October 28, 1955, the date that the order was mailed to the old address in Modesto, the building at such address had been torn down and the property turned into a parking lot six months earlier. (R. 104-105) Up until February, 1955, Venus worked at the gymnasium located at such address. He was employed as a physical training instructor and a massager. He worked and slept at the place of employment. (R. 62, 83)

The clerk testified that she prepared the original and carbon copy of the order to report for induction, as well as the envelope in which the order was enclosed. (R. 30) She said the original order "was folded and placed in the envelope together with instructions and mailed to the registrant at this address typed on the order for induction." (R. 30) She said that she initialed the carbon copy

with the initials of the member who signed the original.
(R. 30) As to the mailing out of notices, the record shows:

"Q. And is it your personal duty to mail out all the notices of any nature, or do you delegate some of your responsibilities to other clerks in the office?

"A. Some of my work is done by others, yes. . . .

"Q. Do you personally mail out all the notices of classification and orders to report, or do you delegate some of that specific responsibility to another clerk?

"A. Well, some of the work is done by others, but the orders for induction, those I usually send out myself if I am in the office. . . .

"Q. And on this occasion did you put this particular letter in that box?

"A. I can't say that I put it in the mail box. I put it in the box in our office, mail box in our office.

"Q. Who picks the mail up from the mail box in your office?

"A. Usually one of us clerks takes the mail over and puts it in the box before or at the close of business for the day.

"Q. You have a specific receptacle in your office then where you put all your out-going mail?

"A. Yes, that is correct. . . .

"Q. Then, in other words, you didn't actually mail this notice; you merely put it in the box within your office to be mailed?

"A. Yes. I don't recall if I mailed it that day or not.

. . .

"Q. And on this particular day all you recall doing is putting it in the box within the office?

"A. Yes.

"Q. But that is not a government mail box; that is just—

"A. Well, it is too, because we are a government office. So in a way it is a government mail box. We are responsible for it to see that it gets in the box.

"Q. It is not a regular postal box from which a governmental employee would come and get mail out of it?

"A. No." (R. 38, 39, 39-40, 40, 40-41)

The local board never attempted to locate Venus at the San Diego address of his parents, mentioned by Venus to the local board in his letter of June 7, 1954. (R. 88-89) After the date of preparing the induction order the local board did not communicate with Venus and he heard nothing from the board. (R. 87) The first he learned about the classification and the order being mailed was when he was interviewed by an F.B.I. agent at the Physical Services establishment in Los Angeles in April, 1956. (R. 65-66) Venus told the F.B.I. agent that he had not received the card sent to him or the order to report for induction in September and October, 1955. (R. 66) Venus notified the local board on April 9, 1956, of a change of address, and that he had been a full-time minister since August, 1955, and was married December 31, 1955. He asked for his latest classification and any other information he should have. [32] On August 21, 1956, he wrote another letter to the local board asking why the board had not replied to his previous letter. [29] On August 29, 1956, the United States Attorney wrote Venus that he was delinquent because he had failed to advise the local board of his change of address and that he was also delinquent for failure to report for induction. [28]

On September 4, 1956, Venus wrote a letter to the local board, with a carbon copy to the United States Attorney, that he had notified the local board on June 7, 1954, that he could be reached at the home of his parents, 1120 30th Street, in San Diego; that in February, 1955, he had mailed a postcard to the local board notifying it of his new address in San Diego, 1120 30th Street; that mail sent to his parents always reached him; that he had always complied with every instruction; and that he had notified the local board each time he changed his address. He told the local board he had not received the induction notice and if he had he

would have reported, but would not have submitted, just as he did in May 1954. [26]

On October 2, 1956, the Assistant United States Attorney telephoned the local board and stated that it had been decided not to prosecute Venus, because there was doubt as to whether the report for induction and the last I-A classification card had been mailed to the correct address. [19]

On November 14, 1956, Venus notified the local board of a new address. [16] On April 25, 1957, Venus called at the local board and had someone with him to help him copy part of his draft board file. [15] He testified that he ultimately went to the local board in April, 1957, "according to instructions that the F.B.I. agent gave me." (R. 81) He said the F.B.I. agent told him to write to the local board and he did so in April, 1956. (R. 81, 91)

Concerning his letter in April, 1956, he said "I thought that, because I didn't receive any induction notice, that they would send me another induction notice, if anything, and then I could appeal that. Or I didn't even receive a 1-A Classification, let alone an induction notice. But after not hearing from the board—I had written them, and then I had gotten a letter from another office." (R. 80-81) He said he thought he deserved another notice to report for induction, but because he didn't get it he went to the board office. (R. 68)

The clerk testified that during the visit to the office in April, 1957, Venus asked her what could be done about his case and that she told him that she "couldn't tell him what to do." (R. 51) Venus testified that he asked her whether he could appeal or if there was anything he could do and the clerk informed him that the case was out of the board's hands and in the hands of the district attorney and "not in their jurisdiction anymore." (R. 71) She said that Venus told her if he had received the order he would have reported but would have refused to submit to induction. (R. 51) She said she showed him a copy of the induction order. (R. 31)

Venus testified that he asked the clerk, "Didn't you think it strange that I didn't report, since I have reported and been completely cooperative for four or five years?" And that she said she did think it strange because he had been very cooperative. (R. 69)

Venus said that when the clerk told him she assumed that he got the order he insisted that he had not received it. (R. 70) She also testified that during the visit he asked her whether the board had ever received the postcard written by him and mailed to the local board showing the change of address and she informed him that if the board had received it, it would have been in the file. (R. 51)

The clerk testified that Venus told her that it undoubtedly appeared unusual to her that he did not report as he had in response to a previous order to report. (R. 59-60) She said that it did appear strange to her but she thought he had received the order and would report. (R. 60) Venus testified that if he had received the order he would have reported. (R. 74-75) He had reported in May, 1954, and refused induction because he was an ordained minister. (R. 75, 79) Venus said that he did not have an intent to willfully and knowingly fail to report. (R. 75)

QUESTIONS PRESENTED AND HOW RAISED

I.

Whether the undisputed evidence shows that the appellant, as a matter of law and fact, did not refuse to report for induction as charged in the indictment, either (1) "knowingly" or (2) on the date alleged in the indictment.

This question was raised by grounds 1, 2 and 3 of the motion for judgment of acquittal. (R. 106)

II.

Whether the undisputed evidence shows that the order to report for induction was not actually deposited in the

United States mails, either by putting it in a mail box or putting it in the post office, and therefore is not a valid order.

This question was raised by an unnumbered ground in the motion for judgment of acquittal. (R. 113-125)

III.

Whether the undisputed evidence shows that, even if mailed, the order to report for induction was mailed to the wrong address and therefore is not a valid order.

This question was not specifically raised in the motion for judgment of acquittal but is implicitly raised in grounds 1, 2 and 3 of the motion for judgment of acquittal. (R. 103) This question should be passed on, even if considered not raised, under *Franks v. United States*, 216 F. 2d 266, at page 270 (9th Cir. 1954).

IV.

Whether 32 C.F.R. § 1641.3 (Selective Service Regulations), as construed and applied, is unconstitutional because its provisions about constructive notice denies appellant due process of law, contrary to the Fifth Amendment to the United States Constitution.

This question was raised by grounds 4 and 5 of the motion for judgment of acquittal. (R. 106-107)

V.

Whether 32 C.F.R. § 1642.2 (Selective Service Regulations), as construed and applied, is unconstitutional because its provisions as to continuing duty to comply with the order to report for induction, denies appellant due process of law, contrary to the Fifth Amendment to the United States Constitution.

This question was raised by grounds 6 and 7 of the motion for judgment of acquittal. (R. 107)

VI.

Whether the district court committed error in charging the jury that the appellant had a continuing duty to report after November 8, 1955.

This question was raised by exception taken to the charge of the court. (R. 146, 151)

VII.

Whether the district court committed error in refusing to give defendant's requested instruction number 12.

This question was raised by the request to charge and the exception on the refusal to so charge. (R. 10, 152)

VIII.

Whether the district court committed error in refusing to give defendant's requested instruction number 13.

This question was raised by the request to charge and the exception on the refusal to so charge. (R. 11, 152)

IX.

Whether the district court committed error in refusing to give defendant's requested instruction number 14.

This question was raised by the request to charge and the exception on the refusal to so charge. (R. 11, 152)

X.

Whether the district court committed error in refusing to give defendant's requested instruction number 15.

This question was raised by the request to charge and the exception on the refusal to so charge. (R. 11, 152)

XI.

Whether the district court committed error in refusing to give defendant's requested instruction number 18.

This question was raised by the request to charge and the exception on the refusal to so charge. (R. 12, 153)

XII.

Whether the district court committed error in refusing to give defendant's requested instruction number 19.

This question was raised by the request to charge and the exception on the refusal to so charge. (R. 12, 153)

XIII.

Whether the district court committed error in refusing to give defendant's requested instruction number 20.

This question was raised by the request to charge and the exception on the refusal to so charge. (R. 13, 153-154)

XIV.

Whether the district court committed error in refusing to give defendant's requested instruction number 21.

This question was raised by the request to charge and the exception on the refusal to so charge. (R. 13, 154)

XV.

Whether the district court committed error in refusing to give defendant's requested instruction number 23.

This question was raised by the request to charge and the exception on the refusal to so charge. (R. 13-14, 154)

XVI.

Whether the district court committed error in refusing to give defendant's requested instruction number 25.

This question was raised by the request to charge and the exception on the refusal to so charge. (R. 14, 154-155)

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal duly made at the close of all the evidence. (R. 106-130, 132)

II.

The district court erred in failing to grant the motion for judgment of acquittal duly renewed after the verdict of the jury. (R. 17-18, 19, 164-196)

III.

The district court erred in failing to grant the motion for a new trial duly made after the verdict of the jury. (R. 16-17, 19)

IV.

The district court erred in charging the jury as follows:

“You are instructed that in order to find the defendant guilty as charged in the Indictment, you must find . . . That the defendant did on such date [November 8, 1955], and at all times thereafter, knowingly failed to report for induction. (R. 145)

This charge was made over the exceptions of the appellant as follows:

“I feel that this is an erroneous statement of the law and can only be corrected by deleting the words: ‘ * * * and at all times thereafter * * * ’. It is the defendant’s contention that he only had one duty, namely, to report on November 8, 1955, as charged in the indictment, and that any question of what he did thereafter is not competent under the charge of the indictment.

“I request of the Court that the instruction be re-

read to the jury deleting that particular clause." (R. 151)

V.

The district court erred in charging the jury as follows:

"The selective service regulations which are passed pursuant to law provide that 'When it becomes the duty of a registrant * * * to perform an act * * * the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act * * * shall in no way operate as a waiver of that continuing duty.'

"In this connection, if you find that the defendant knowingly failed to report for induction at any time between November 8, 1955, and August 8, 1957, the date of the return of the Indictment, you may find him guilty of the offense charged." (R. 146)

This charge was made over the exceptions of the appellant as follows:

"I believe the whole instruction should be withdrawn from the jury, because it charges the defendant with a duty to report on November 8, and thereafter that he had a continuing duty to report. I feel that this is an erroneous conception of the law, that he had a duty to report, particularly in light of the fact that if the jury believes him, that he never received an order or an order was never given." (R. 151)

VI.

The district court erred in refusing to give defendant's requested instruction number 12, which reads as follows:

"Before there arises a presumption of fact that the addressee of a letter has received it, it must first be proved that it was properly addressed, but no such presumption arises unless it appears that the person

to whom sent resided at the place to which it was mailed." (R. 10)

The refusal of the court was excepted to as follows:

"I believe that under the facts of this case the defendant mailed a letter. The jury is entitled to know that there is a presumption that the letter he mailed was received; it was properly addressed. There has been no such instruction to the jury. The jury can well find, if they were instructed, that there is a presumption that the letter had been mailed, it was duly stamped and addressed, and that the parties live at that address; that the local board receive[d] it; and that, therefore, they had that letter and didn't send his order to report to his last known address." (R. 152)

VII.

The district court erred in refusing to give defendant's requested instruction number 13, which reads as follows:

"The presumption of receipt from mailing cannot be based upon the presumption, unsupported by direct evidence, that a public officer performed his or her duty in mailing a notice." (R. 11)

The refusal of the court was excepted to as follows:

"I object to the Court's failure to give Defendant's Number 13, in that there must arise in the jurors' minds some type of presumption from the fact that the testimony stated the usual order of mailing in the government's office. However, this instruction should be given to show that there was no direct evidence that a public officer performed his duty and, therefore, the presumption that the mail was taken care of regularly should fall." (R. 152)

VIII.

The district court erred in refusing to give defendant's requested instruction number 14, which reads as follows:

"Where the fact of notice is made by statute to rest on the presumption that a letter mailed was received, there must be clear proof of the mailing." (R. 11)

The refusal of the court was excepted to as follows:

"I object to the Court's failure to give Defendant's Number 14, in that in this case there is a great question of whether or not the mail was actually sent." (R. 152)

IX.

The district court erred in refusing to give defendant's requested instruction number 15, which reads as follows:

"To establish mailing of a letter containing a notice, in the absence of direct evidence, there must be proof of an invariable custom or usage in an office of depositing mail in a certain receptacle, that the letter in question was deposited in such receptacle and, in addition, there must be testimony of the employee whose duty it was to deposit the mail in the post office that he or she either actually deposited that mail in the post office or that it was his or her invariable custom to deposit every letter in the usual receptacle." (R. 11)

The refusal of the court was excepted to as follows:

"I object to the Court's failure to give . . . Defendant's Number 15 instructs the jury on the law pursuant to the Rice case as to what is necessary for the government to establish to perform its duty in making out a case of mailing a notice." (R. 152)

X.

The district court erred in refusing to give defendant's requested instruction number 18, which reads as follows:

"If you should find that the defendant has not been given due notice to report for induction pursuant to the Selective Service Regulations, then you are bound to find the defendant did not have a continuing duty to report." (R. 12)

The refusal of the court was excepted to as follows:

"Under the defendant's theory of the case, the jury should have been instructed that if no new notice was given, then defendant never had a duty to report." (R. 153)

XI.

The district court erred in refusing to give defendant's requested instruction number 19, which reads as follows:

"The defendant is being charged with failure to report for induction on November 8, 1955, in San Diego County, California, and any evidence concerning his failure to report after said date shall be disregarded by you in determining whether or not the defendant has performed the acts required of him under the Universal Military Training and Service Act." (R. 12)

The refusal of the court was excepted to as follows:

"Under the defendant's theory of the case, he has only been charged with a failure to report on November 8, 1955, and that any evidence concerning his failure to report thereafter was not charged in the indictment and was not proper for the jury to consider." (R. 153)

XII.

The district court erred in refusing to give defendant's requested instruction number 20, which reads as follows:

"The defendant is being charged with failure to report for induction and not for failure to submit to induction, and therefore any evidence bearing on the question of whether or not defendant intended to submit to induction is to be disregarded in determining whether or not the defendant had any criminal intent on the charge of failure to report." (R. 13)

The refusal of the court was excepted to as follows:

"Defendant contends that whether or not he would have ultimately submitted to induction has no bearing upon the question of whether or not he would have reported; and the jury should have been so instructed in order to make up that distinction. . . . The defendant is charged—this is Defendant's Number 20—with failure to report for induction and not for failure to submit to induction. And, therefore, any evidence bearing on the question of whether or not defendant intended to submit for induction is to be disregarded in determining whether or not the defendant had any criminal intent on the charge of failure to report." (R. 153-154)

XIII.

The district court erred in refusing to give defendant's requested instruction number 21, which reads as follows:

"If you should find that an order to report for induction was not mailed to the defendant's last known address, then you must return a verdict of not guilty." (R. 13)

The refusal of the court was excepted to as follows:

"Under the defendant's theory of the case, if the jury should find that an order to report was never

mailed to his last known address, then they must find him not guilty." (R. 154)

XIV.

The district court erred in refusing to give defendant's requested instruction number 23, which reads as follows:

"You shall not consider the defendant's failure to report after November 8, 1955, as an offense since anything he did after that date has no bearing on the question of whether or not he failed to report on November 8, 1955. The defendant cannot have a continuing obligation to report if you find that he never received an order to report. The only time the defendant would have a continuing obligation to report would be if he had received an order to report. The defendant would have to be charged specifically with a failure to observe this continuing duty to report. The indictment in this case does not so charge the defendant." (R. 13-14)

The refusal of the court was excepted to as follows:

"Under his theory of the case, again, anything that took place after November 8, 1955, had no bearing on the question before the jury as framed by the indictment. In that particular instruction the jury is informed, or should have been informed, that the defendant didn't have an obligation to report if he never received the order to report as specified in the regulations." (R. 154)

XV.

The district court erred in refusing to give defendant's requested instruction number 25, which reads as follows:

"If you should find that the defendant contacted his Local Board upon learning that he had been reported delinquent, and said Board, through its agents or em-

ployees, informed the defendant that there was nothing that they could do, but that the matter was up to the United States Attorney's Office, then you should find that the plaintiff has waived its rights in requiring the defendant to make any further report." (R. 14)

The refusal of the court was excepted to as follows:

"I believe that this instruction should have been given to the jury, so that they would know that if the defendant actually went to the local board and the Board, through its agent or employees, failed to inform the defendant what to do or did inform him that there was nothing they could do, that the government has put themselves in the position of waiving any right to have the defendant to continue to report by their own actions; and they should be estopped from prosecuting him or attempting to convict him on this continuing duty to report theory. By their own acts they have put him in a position where he failed to report because of things actually told to him by the government's board or the clerk of that board." (R. 154-155)

ARGUMENT

ONE

The undisputed evidence shows that the appellant, as a matter of law and fact, did not refuse to report for induction as charged in the indictment, either "knowingly" or on the date alleged in the indictment.

The undisputed evidence shows that the appellant did not know that he had been ordered to report for induction. The local board order was mailed to the wrong address. Because the building was torn down and was no longer being used, there was no such address to which the order could be delivered. The evidence shows that the local board had been notified of the change of address.

The evidence shows that the appellant did not learn of

the induction order until he was interviewed by an agent of the Federal Bureau of Investigation in the early part of 1956. This was several months after the order had been issued. The appellant, on the instructions of the F.B.I. agent, promptly sent a letter to the local board, but he did not get an answer. He received no answer to a second letter addressed to the local board. He finally went to the local board office in April, 1957, and inquired of the clerk as to what he might do. The clerk told him that it was out of the hands of the local board and was in the hands of the United States Attorney. She apparently knew of no 'continuing duty' on appellant's part. She said, "I couldn't tell him what to do." (R. 51)

In this circumstance, there is no knowing violation of the law, and on the date charged in the indictment especially. There was no willful refusal to comply with the order. Appellant testified that had he received the order he would have reported but would have refused to submit, as he had previously done in 1954. There is no justification, therefore, for any conclusion upon the evidence that there was a knowing violation of the law.

The term "knowingly," as used in Section 12 (a) of the Universal Military Training and Service Act (50 U.S.C. App. § 462 (a)), is synonymous with "willfully." It means prompted by bad faith or with evil intent or for an illegal purpose. It means without legal justification. If Venus had legal justification or reasonable grounds for belief he was legally justified in not reporting for induction it cannot be said he illegally, knowingly and unlawfully failed to perform a duty required of him under the Act.

Directly in point with this case, and controlling here, is *Graves v. United States*, 252 F. 2d 878, 883, (9th Cir. 1958), wherein this Court held that the facts, similar to those here, failed to show a knowing failure, neglect or refusal to perform a statutory duty. The language of this Court in that case is applicable here: "The appellant was charged with knowingly failing and neglecting to report

for induction on October 13, 1955, pursuant to a notice to report on that date. He cannot be convicted on this indictment of a failure or neglect to perform a different duty at a different time. *Cole v. Arkansas*, 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 644."—See also *Heikkinen v. United States*, 355 U.S. 273, 78 S. Ct. 299, 302 (1958).

Silverman v. United States, 220 F. 2d 36 (8th Cir. 1952), is inapplicable to the facts here because in that case there was sufficient evidence to warrant a jury in finding that appellant actually received the notice to report for induction.

Appellant here relies on *United States v. Murdock*, 290 U.S. 389, 394-396 (1933), to support his contentions under this point. There the defendant was convicted of willfully and knowingly failing to supply information as to his income. The grounds of the refusal were that he believed he was exempt on the items inquired about and that the Constitution guaranteed him the right to decline to incriminate himself. This reasonable belief of exemption, which was erroneous, and the fear that he might incriminate himself, entitled the jury to consider that if he had good faith he could not be convicted of willfully refusing to give the information.

Where an act or omission must be knowingly and willfully done, not only a knowledge of the act is required, but a determination that accused had a specific intent to do it. (*United States v. Murdock*, 290 U.S. 389, 394-396 (1933); *Bentall v. United States*, 262 F. 744) The well-known presumption that a person intends the natural consequences of his acts is rebuttable, but a specific intent is an essential element of the offense charged.—*Laws v. United States*, 66 F. 2d 870.

If the Court were invoking the presumption that men intend the natural and probable consequences of their acts, its rulings would be in error. The presumption of wrongful intent based on the natural consequences of one's words or acts is not a conclusive presumption but a rebuttable

one and this rebuttal may take the form of testimony by the defendant himself that he intended no such results; and an instruction that accused could not contradict the assumption flowing from his act was held to be reversible error. (*Bentall v. United States*, 262 F. 744; *Laws v. United States*, 66 F. 2d 870) Such a presumption is not applicable in the presence of positive proof that defendant had a different intent. (*McDonald v. United States*, 9 F. 2d 506; *Blumenthal v. United States*, 88 F. 2d 522) A presumption that men intend the natural consequences of their acts is not applicable in the face of affirmative proof that defendant had a different intent. An instruction that if the defendant committed certain acts of violence knowing their effect, intent would be presumed, was held to be reversible error. (*McDonald v. United States*, 9 F. 2d 506) It has been authoritatively held that a defendant may by his uncorroborated testimony rebut the presumption that one is presumed to intend the natural and probable consequences of his act, in fact that it may be easily rebutted.—*Weiss v. United States*, 122 F. 2d 675; cert. denied 314 U.S. 687 (1941).

Willfulness "is something over and above the mere intent to do a thing." (*United States v. Saglietto*, 41 F. Supp. 21) Where an offense is criminal only when knowingly and willfully done, it is not only necessary to prove knowledge of the act but that it was done with a bad intent. (*Bentall v. United States*, 262 F. 744) When an act or omission is a crime only if it is willfully and knowingly done, a specific wrongful intent is of the essence of the offense; that is, there must not only be knowledge of the existence of the obligation but a wrongful intent to evade it.—*Hargrove v. United States*, 67 F. 2d 820.

Criminal intent has been defined as "a mind at fault before there can be a crime"; as such it is an essential fact to be proved in the establishment of the guilt; though Congress may define an offense without unlawful intent, a statute will not be so construed unless legislative intent

clearly so shows.—*Masters v. United States*, 42 App. D.C. 350; *United States v. Burroughs*, 65 F. 2d 796, affirmed in part 290 U.S. 534 (1934).

Thus, when a specific intent is a part of the crime, the existence of such intent must be proved as a fact like any other fact in the case, and it is not presumed from the commission of an unlawful act. (*Transportation Company v. Parkersburg*, 107 U.S. 691 (1882); *Savitt v. United States*, 59 F. 2d 541; *United States v. Burnett*, 53 F. 2d 219; *United States v. Houghton*, 14 F. 544; *Herrman v. Lyle*, 41 F. 2d 759) A criminal intent is necessary unless the statute otherwise provides.—*Nosowitz v. United States*, 282 F. 575.

“There can be no crime, large or small, without an evil mind. In other words, punishment is a sequence of wickedness, without which it cannot be.”—*Bishop on Criminal Law*, §§ 287, 288.

It was said in *Felton v. United States*, 96 U.S. 699, 702 (1878): “Doing or omitting to do a thing knowingly and willfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or omit doing it. ‘The word “willfully,”’ says Chief Justice Shaw, ‘in the ordinary sense in which it is used in statutes, means not merely “voluntarily,” but with a bad purpose.’ 20 Pick. (Mass.) 220. ‘It is frequently understood,’ says Bishop, ‘as signifying an evil intent without justifiable excuse.’ *Crim. Law*, vol. i. sect. 428.”

Venus’ situation is very similar to that involved in *United States v. Hoffman*, 137 F. 2d 416 (1943). There the court held that if a registrant, through conditions over which he had no control, failed to report as ordered he would not be guilty of a criminal violation of the law. Compare *United States v. Graham*, 128 F. 2d 811.

The case of *Graves v. United States*, 252 F. 2d 878, at pages 881, 882 and 883, is directly in point on both issues presented by this point: (1) no knowing violation of the

law, and (2) no continuing duty as a basis of conviction after the date alleged in the indictment.

It is respectfully submitted that this Court should hold, as a matter of law and fact, that the appellant did not knowingly refuse to report for induction at any time, either on the date alleged in the indictment or at a later date, and that this Court should further hold that the appellant cannot be convicted of a failure to report for induction on any date after November 8, 1955, the date alleged in the indictment, because there is no allegation in the indictment that there was a continuing duty on the part of appellant to report for induction from and after such date.

T W O

The undisputed evidence shows that the order to report for induction was not actually deposited in the mails and therefore there is no valid order supporting the indictment.

The clerk in this case was the only witness that testified. She said that she prepared the order to report for induction and the envelope in which it was sealed. She also testified that the envelope was placed in a box maintained in the office where all outgoing mail was kept for mailing. But neither she nor any other employe of the local board testified that the envelope and order was actually deposited in the United States mails. As far as the evidence goes the envelope addressed to the appellant (to the wrong address) winds up in the outgoing mail receptacle in the local board office. After that there is no proof that it was ever physically deposited in the United States mails. There is no evidence that the bundle in which it was presumably tied was mailed in the United States mails. There is no evidence of custom sufficient to overcome the presumption of innocence.

It is true that the minutes of the local board opposite the date "OCT 28 1955" bears the stamp "SSS FORM 252 MAILED". [12] But the word "MAILED" appearing in

the minutes is a mere conclusion in view of the direct evidence of the clerk contradicting the entry in the minutes. It is a stamp that was placed in the minutes after the order was prepared, sealed in the envelope and placed in the box used for outgoing mail in the local board office. But it was not placed on it after actual mailing. The entry in the minutes is therefore not conclusive and is not evidence of the physical act of mailing in the United States mails which must be proved before it can be assumed that the appellant actually received the order.

The entry was impeached and disputed by the testimony of the clerk, which failed to show that the order was actually mailed.

This case is distinguishable from *Johnson v. United States*, 126 F. 2d 242 (8th Cir. 1942), where the clerk of the local board testified that he actually mailed the classification card and also that he orally informed the registrant concerning the classification.

In *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884), it was held that the presumption of delivery of a letter does not arise until the letter is "proved to have been either put into the post office or delivered to the postman, . . ."

In *Henderson v. Carbondale Coal and Coke Co.*, 140 U.S. 25, 37 (1891), the same holding was made. The Court said: "This is not a conclusive presumption, and it does not even create a legal presumption that such letters were actually received, . . ." The Court went on to say: "But no such presumption arises unless it appears that the person addressed resided in the city or town to which the letter was addressed; . . ."

In *Schutz v. Jordan*, 141 U.S. 213, 220 (1891), Justice Brewer said: "So while the mailing of a letter creates an inference, raises a presumption that the party to whom it was addressed received it in due course of mail, and thus acquired knowledge of the matters stated therein, yet such presumption is one of fact, not of law. It is not conclusive, but subject to control and limitation by other facts."

See also *Crude Oil Corp. v. Comm'r of Internal Revenue*, 161 F. 2d 809, 810 (10th Cir. 1947); *Central Paper Co. v. Comm'r of Internal Revenue*, 199 F. 2d 902, 904-905 (1952); *Arkansas Motor Coaches v. Comm'r of Internal Revenue*, 198 F. 2d 189, 191 (1952).

In *United States ex rel. Helmecke v. Rice*, 281 F. 326, 332-336 (S. D. Tex. 1922), it was proved there was a uniform custom to prepare all letters in the mail. The court held that there was substantial evidence sufficient to find that the order was mailed, but here there is no positive proof about any custom of depositing in the mails. Also the evidence of the clerk is that she did not know whether the envelope was actually deposited in the mails: "I can't say that I put it in the mail box." (R. 39) She said that she could not recall if she mailed it. (R. 40)

A much stronger distinction exists. Let it now be stated. This is a criminal case. The burden is upon the Government to prove that the envelope was actually mailed. The Government has wholly failed to call any witness employed in the local board office whose duty it was to actually mail the envelope. The Government witness said she did not do it and that it was not her duty. The failure to call such assistant clerk of the board as a witness gives rise to a presumption that the evidence would be unfavorable to the Government. The rule is that it would be favorable to the appellant if some other employe of the board were called. The failure to call the person whose responsibility it was to deposit the office mail in the post office or United States mail box is a fatal missing link in the Government's evidence.

United States ex rel. Helmecke v. Rice, 281 F. 2d 326, is distinguishable from this case in that this is a criminal case. That case was a habeas corpus application, a civil proceeding. The burden was upon the petitioner in that case to prove the lack of mailing. Here the burden is upon the Government to prove positively that the order had been actually deposited in the United States mails. The

Government wholly failed to prove that it had or any circumstances that would give rise to the actual mailing of the order.

There is no presumption of legality in administrative proceedings where there is a prosecution in a criminal case based upon such administrative proceedings. The reason is that the presumption of innocence rebuts and repels the presumption of regularity in administrative proceedings.

In *Jones on Evidence in Civil Cases*, Fourth Edition, Bancroft-Whitney Co., San Francisco, 1938, Volume 1, § 101, it is said: "Generally speaking, no legal presumption is so highly favored as that of innocence; ordinarily substantially all other presumptions yield to it in case of conflict." There the author cites *Dunlop v. United States*, 165 U.S. 486 (1897), and *Edwards v. United States*, 7 F. 2d 357. It is later stated in this section, fourth paragraph, that the presumption of innocence prevails over a large number of other presumptions.

Notwithstanding *Koch v. United States*, 150 F. 2d 762, 763 (4th Cir. 1945), and *United States v. Fratricks*, 140 F. 2d 5, 7 (7th Cir. 1944), to the contrary, appellant says that the presumption of innocence in criminal proceedings makes inapplicable such presumption of regularity.

It is respectfully submitted that there is no valid order supporting the indictment because the Government wholly failed to supply the vital link of proof of actual deposit of the envelope containing the order into the United States mail box or the post office.

THREE

The undisputed evidence shows that if the order was mailed it was directed to the wrong address and therefore there is no valid order supporting the indictment.

The undisputed evidence shows that Venus sent a postcard, addressed to the local board, through the mails. The evidence shows he actually deposited it in the United States

mails in February, 1955, in which he informed the local board of his new address. Since the local board file was away from the board at the time it must be conclusively presumed that the postcard was actually mailed to the local board.—*Rosenthal v. Walker*, 111 U.S. 185, 193 (1884); *Henderson v. Carbondale Coal and Coke Co.*, 140 U.S. 25, 37 (1891); *Schutz v. Jordan*, 141 U.S. 213, 220 (1891); *Crude Oil Corporation v. Comm'r of Internal Revenue*, 161 F. 2d 809, 810 (10th Cir. 1947); *Central Paper Co. v. Comm'r of Internal Revenue*, 199 F. 2d 902, 904-905 (1952); *Arkansas Motor Coaches v. Comm'r of Internal Revenue*, 198 F. 2d 189, 191 (1952).

Based upon these cases appellant proved that the postcard was actually deposited in the United States mails, which gives rise to the conclusive presumption, in the absence of any contradictory evidence, that the postcard was received by the board.

The local board clerk testified that the postcard was not received, but she said that if it had been received it would be in the file. The testimony of the clerk may be completely disregarded because the file was out of the possession of the local board at the time the card was mailed in February, 1955. It was not in the possession of the board from November 2, 1954, to July, 1955. It had been sent to the Assistant Deputy State Director in Los Angeles on November 2, 1957. [157] The file shows it was received at Los Angeles on November 3, 1954. [157] Appellant's cover sheet was not returned to the local board until July 1, 1955. [12, 166] So how can it be said that the card was ever put in the file in view of this obvious administrative irregularity?

On July 1, 1955, the local board was informed by the State Director that the prosecution had been dismissed. [167] The local board received the file back from Los Angeles on July 11, 1955. [12] Since the file was out of the possession of the local board when the postcard was re-

ceived from the appellant in February, 1955, obviously the postcard could not be placed in the file when the card was received in the mails. The Court cannot speculate as to what disposition was made of the postcard by the clerk, or what disposition would ordinarily be made of such correspondence when the file is out of the possession of the local board, because there was no evidence given by the Government in such a situation.

In the case of *In re Abramson*, 196 F. 2d 261 (3rd Cir. 1952), it was stated that the draft board action was invalid because the letter addressed to the registrant had been directed to the wrong address and not in accordance with the latest change of address given to the local board by the registrant. The court said:

"In logic, nothing to the contrary appearing, we think this rational conception of mailing as including proper addressing should be viewed as pervading the body of Selective Service regulations so that when Section 623.30 employs the phrase 'mails him' it means 'mails [properly addressed to] him.' Moreover, while administrative accommodation may dictate that rights of registrants normally be terminated before actual receipt of an induction notice, we think it only fair, and not burdensome on government, that a cut off stated in terms of mailing depend upon administrative accuracy in directing the communication. If substantial error appears in the mailing address the communication should not be regarded as mailed to the addressee, at least until the time of delivery. And there was such error here. For it is not to be presumed that a letter addressed to the wrong postal area in the country's largest metropolis will proceed in normal course of post to its intended destination.

"Our conviction that we have rightly construed the regulation in question is reinforced by the fact that in dealing with a variety of legal problems courts rather uniformly have reasoned that normal legal con-

sequences attach to the mailing of a communication only when it is properly addressed. *E.g.*, Restatement, Contracts, §§ 64-67 (1932) (acceptance of an offer); Note, 155 A.L.R. 1279 (1945) (notice in tax foreclosure proceedings); Uniform Negotiable Instruments Act, §§ 105, 108 (notice of dishonor); Uniform Commercial Code, § 1-201 (notices and writings)."

This point was impliedly raised in grounds 1, 2 and 3 of the motion for judgment of acquittal. In event, however, the Court concludes that the point was not raised, then the Court is respectfully requested to consider this point because it is plain error within the meaning of Rule 52 (b) of the Rules of Criminal Procedure, as this Court said in *Franks v. United States*, 216 F. 2d 266, at page 270.

It is respectfully submitted that this Court should conclude that there is no valid order supporting the indictment because the order to report for induction was mailed to the wrong address.

F O U R

Sections 1641.3 and 1642.2 of the Selective Service Regulation (32 C.F.R. §§ 1641.3; 1642.2) are unconstitutional because, as construed and applied, they deny appellant due process of law, contrary to the Fifth Amendment to the United States Constitution.

This point combined questions IV and V of "Questions Presented and How Raised," supra, this brief. They were raised by grounds 4, 5, 6 and 7 of the motion for judgment of acquittal. (R. 106-107)

Section 1641.3 of the Selective Service Regulations provides for constructive notice of all orders and other actions taken by the local board. Section 1642.2 imposes on the registrant a continuing duty to comply with any orders made by the local board.

The undisputed evidence shows that Venus did not re-

ceive the order to report for induction and that he did not learn about it until April, 1956, when he was contacted by the F.B.I. agent. Then he promptly wrote a letter to the local board inquiring about his status. This was followed up by another letter several months later complaining about the failure of the local board to respond. In April, 1957, he visited the local board and was there told by the clerk that the entire matter was out of the hands of the local board and she could give him no information since it was within the exclusive jurisdiction of the United States Attorney.

The first he knew about the outstanding order to report for induction was in April, 1956, and he took the only steps that he could take, and which the F.B.I. agent instructed him to take, by writing to the local board. When the local board did not respond he followed this up with another letter, and finally with a visit to the local board where he was given a "run around," by the clerk's saying it was out of the jurisdiction of the local board.

The indictment charged Venus with having failed to report for induction on November 8, 1955. He had no knowledge of this order and attempted, unsuccessfully, to get information from the local board as to what he should do. Being informed merely that it was out of the hands of the local board and within the exclusive jurisdiction of the United States Attorney, he took no further action to report.

Under all the facts and circumstances of this case, Section 1641.3, which imposes constructive notice upon appellant of the outstanding order to report for induction, and Section 1642.2, which commands him to comply with the outstanding order from day to day, of which he had no knowledge, and also which the local board did not give him an opportunity to comply with by reporting thereafter, constitute a deprivation of procedural due process of law, contrary to the Fifth Amendment to the United States Constitution.

The Regulations, as construed and applied to the facts

and circumstances of this case, have denied Venus of his rights guaranteed by the Fifth Amendment to due process of law contrary to the holding of the United States Supreme Court in *Tot v. United States*, 319 U.S. 463 (1943). —*Manley v. Georgia*, 279 U.S. 1 (1929); *Benton v. United States*, 232 F. 2d 341 (D.C. Cir. 1956); *McFarland v. American Sugar Refining Co.*, 241 U.S. 79 (1916); *Government of the Virgin Islands v. Torres*, 161 F. Supp. 699 (D.C. V.I. 1958) (Maris, Circuit Judge, presiding).

It is respectfully submitted that Sections 1641.3 and 1642.2 of the Selective Service Regulations (32 C.F.R. §§ 1641.3; 1642.2), as construed and applied to the particular circumstances of this case, are unconstitutional.

FIVE

The district court committed reversible error in charging the jury that the appellant had continuing duty to report after November 8, 1955, up to and including August 8, 1957, the date of the return of the indictment, and that if the jury found that he did not so report, it could convict.

The district court charged the jury that it could convict the appellant if he knowingly failed to report for induction at all times after November 8, 1955. (R. 145) The district court also thereafter charged that, pursuant to 32 C.F.R. § 1642.2, there was a continuing duty from day to day on the part of the appellant to report for induction. The jury was informed that if the appellant failed to report at any time between November 8, 1955, and August 8, 1957, the date of the indictment, it would be justified in finding the appellant guilty. (R. 145, 146)

The jury returned a verdict of guilty, based upon this instruction. The instruction of the trial court and the verdict of the jury constitute a construction and application of 32 C.F.R. § 1642.2 to the particular facts in this case so as to deny the appellant of his rights upon the trial of the case, contrary to the Fifth Amendment to the United

States Constitution, in that he has been denied due process of law.

The appellant has been convicted upon a failure to do something of which he had no notice. The jury has been permitted to convict him upon speculation and no evidence of guilt by knowingly refusing to report for induction.

Appellant wrote inquiring about his status and visited the local board and orally requested to be informed as to what he should do. The representative of the local board informed him that the matter was out of the hands of the local board and there was nothing to tell him.—*Tot v. United States*, 319 U. S. 463 (1943); *Heikkinen v. United States*, 355 U. S. 273, 78 S. Ct. 299, 302, 303; *Graves v. United States*, 252 F. 2d 878, 882-883 (9th Cir. 1958).

In the face of this evidence and as a result of the court's charge—which was clearly erroneous—appellant was found guilty in violation of his rights to due process of law. The court's charge was erroneous and requires a reversal of the judgment of conviction.

It is respectfully submitted that this Court should conclude that the trial court committed reversible error in charging the jury that appellant had a continuing duty to report after November 8, 1955, up to and including the date of the indictment.

SIX

The district court committed reversible error in failing to give defendant's requested instructions numbers 12, 13, 14, 15 and 21, requiring the jury to find that there was an actual performance of public duty to deposit the envelope, containing the order, in the United States mails before it could be presumed that (1) the local board received appellant's card and (2) the appellant received the order to report for induction.

The testimony of appellant and his supporting witness establishes that the appellant mailed to the local board a

postcard notifying it of the change of address in February, 1955. At that time the cover sheet (draft file) of the appellant was out of the hands of the local board. It has been heretofore submitted that under all the circumstances the Court should hold as a matter of law and of fact that the local board received the postcard and that it was charged with notice of the correct address of the appellant. It has been also heretofore argued that the Court should hold as a matter of law that the local board mailed the order to report to induction to the wrong address, because of being charged with a receipt of the notification of the change of address.

In the event, however, that the Court does not hold that the local board is so charged with notice as a matter of law, then it is here submitted that the question of whether the local board had actual notice of the change of address was an issue of fact. It was a theory of defense that should have been submitted to the jury by the trial court. In defendant's requested instruction number 12, the district court was asked to charge that there arises a presumption of fact that an addressee of a letter has received it if it has been proved to have been properly addressed, and when it appears that the person to whom it was sent "resided at the place to which it was mailed." (R. 10)

The exception to the charge of the court in refusing to give this instruction was that under the facts of the case his communication had been mailed and that it was up to the jury to say whether or not the notice was received by the local board. (R. 152). It was the responsibility of the trial court, therefore, to submit to the jury whether the local board had notice of the change of address. This issue of fact and defensive theory was not submitted to the jury as requested by the appellant.

It was a question of fact for the determination of the jury as to whether the clerk or some other employe of the local board actually deposited the envelope containing the order in the United States mails.

The credibility of the clerk, as prosecuting witness, was involved. There was a question of fact to be determined by the jury on this issue as to whether there was a regularity of the administrative proceedings followed in the handling of the order, the envelope and the mailing of them.

Defendant's requested instruction number 12 was upon a subject matter not covered in the court's charge. The court was requested to put to the jury that it must first find that the card mailed by the appellant was properly addressed and that the addressee actually resided at the place addressed before there could be presumption of delivery. The proof showed that the local board, the addressee, still had the same address. It was for the jury to say if the board actually received the card. Exception was taken to the court's failure to give this instruction. (R. 10, 152)

Defendant's requested instruction number 13 was upon a subject matter not covered in the court's charge. It requested the court to charge the jury that it must first find that the public officer involved actually performed the duty imposed by law in the handling of the mail before it could be presumed that the order was received by appellant. Exception was taken to the court's failure to give this instruction. (R. 11, 152)

Defendant's requested instruction number 14 was upon a subject matter not covered in the court's charge. It requested the court to charge the jury that there must be proof of the actual mailing of the envelope containing the order before there is a presumption of receipt of the mail by appellant. Exception was taken to the court's failure to give this instruction. (R. 11, 152)

The defendant's requested instruction number 15 was upon a subject matter not covered in the court's charge. It requested the court to charge the jury that there must be proof of actual depositing in the United States mails before a presumption of receipt arises. Exception was taken to the court's failure to give this instruction. (R. 11, 152)

The defendant's requested instruction number 21 was

upon a subject matter not covered in the court's charge. It requested the court to charge the jury that if the order was not mailed to the last known address of appellant, he should be acquitted. Exception was taken to the court's failure to give this instruction. (R. 13, 154)

As has been heretofore pointed out, it has been held that there must be actual proof of mailing before any presumption of receipt arises as a basis for a jury to find that the order was actually received.—See *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884); *Henderson v. Carbondale Coal and Coke Co.*, 140 U.S. 25, 37 (1891); *Schutz v. Jordan*, 141 U.S. 213, 220 (1891); *Crude Oil Corporation v. Comm'r of Internal Revenue*, 161 F. 2d 809, 810 (10th Cir. 1947); *Central Paper Co. v. Comm'r of Internal Revenue*, 199 F. 2d 902, 904-905 (1952); *Arkansas Motor Coaches v. Comm'r of Internal Revenue*, 198 F. 2d 189, 191 (1952).

It was a question for the jury to determine as to whether the card advising of a change of address or the order was actually mailed. But nowhere in the court's charge is this subject covered. Yet there was an issue for the jury to decide as to whether (1) the local board mailed the order to the wrong address, or (2) the appellant ever at any time actually received or had any knowledge of the existence of the order to report for induction.

It is true that the court charged that it was necessary to find that the appellant "knowingly failed" to report for induction. (R. 145) But he went on to add that knowledge could be proved by "circumstantial evidence". (R. 145) Nowhere thereafter was the appellant's theory of the case submitted to the jury.

The charge of the court was definitely one-sided and biased in favor of the Government except for the formal parts of the charge about reasonable doubt, burden of proof, and similar stock instructions. The entire charge of the court to the jury on the material facts of the case consisted only of the Government's requested instructions numbers 1, 2, 3, 4, 5 and 7. No other theory was submitted to the

jury. Compare the court's charge (R. 141-148) with the Government's requested instructions. (R. 5-9) It will be observed that the only issues submitted to the jury were those covered in the Government's instructions.

At no point in the court's charge did he submit to the jury any of the issues requested by the appellant. Compare the court's charge (R. 134-149) with the requested instructions of the appellant. (R. 10-14) Note also that the appellant took exceptions to the charge of the court in failing to give such requested instructions. (R. 148-155)

SEVEN

The district court committed reversible error in failing to give defendant's requested instructions numbers 18, 19, 23 and 25, which called upon the court to submit to the jury the issue about whether the appellant had a continuing duty to report.

Defendant's requested instruction number 18 was upon a subject matter inadequately covered in the court's charge. It requested the court to charge the jury that if it should find that Venus had not been given due notice to report for induction, then the jury would be bound to find that there was no continuing duty. Exception was taken to the court's failure to give this instruction. (R. 12, 153)

Defendant's requested instruction number 19 was upon a subject matter inadequately covered in the court's charge. It requested the court to charge the jury that since the indictment charged the appellant with failure to report on November 8, 1955, any evidence concerning his failure to report after that date must be disregarded by the jury. Exception was taken to the court's failure to give this instruction. (R. 12, 153)

Defendant's requested instruction number 23 was upon a subject matter inadequately covered in the court's charge. It requested the court to charge the jury that there was no continuing duty to report if the jury found that he never

received the order to report, especially since the indictment did not charge appellant with a continuing duty to report. Exception was taken to the court's failure to give this instruction. (R. 13-14, 154)

Defendant's requested instruction number 25 was upon a subject matter inadequately covered in the court's charge. It requested the court to charge the jury that if it found that the board, through its agents or employees, informed appellant (when he contacted the board on learning he was reported as a delinquent) that there was nothing the board could do because the matter was up to the United States Attorney, that the jury should find that the Government had waived its rights in requiring appellant to make any further report. (R. 14, 154-155)

It was a question of fact for the jury to determine as to whether the appellant actually knowingly refused to comply with the continuing duty of reporting for induction. He gave testimony about his going to the local board and inquiring about what he should do. The clerk herself testified that she was unable to tell him what to do. She said she informed him that the matter was out of the jurisdiction of the local board and in the hands of the United States Attorney. This testimony was not contradicted by the clerk.

The very fact that the clerk did not take the stand to deny this testimony must be accepted by this Court as true. The very least to be said is that it was a question for the jury to determine whether or not this was true. That being the case issues relating to whether or not the appellant knowingly violated this continuing duty should have been submitted to the jury. This was not done by the trial court.

It has heretofore been pointed out in the previous point that the charge of the court was entirely one-sided, *ex parte* for the Government. It submitted none of the issues of fact appearing in the defendant's requested instructions to the jury. The failure and refusal of the court to give the requested instructions constitutes reversible error.

The court touched upon the matter of continuing duty

of the appellant in his charge to the jury. (R. 145, 146) This charge was identical to the Government's requested instructions numbers 4 and 7. The court did not cover any of the appellant's issues as to the continuing duty. The appellant's views as to the lack of continuing duty were not submitted to the jury. The one-sided ex parte governmental charge by the trial court to the jury was prejudicial and did not fairly and judicially submit to the jury the vital issues as to whether appellant knowingly and willfully refused to comply with the alleged continuing duty on his part to report for induction after November 8, 1955, and up to the date of the return of the indictment, if such dates are legally material dates under the indictment.—See *Graves v. United States*, 252 F. 2d 878 (9th Cir. 1958).

EIGHT

The district court committed reversible error in refusing to give defendant's requested instruction number 20, which called upon the court to submit to the jury that the intent of appellant to refuse to submit to induction—as distinguished from refusal to report for induction—was irrelevant and immaterial.

Defendant's requested instruction number 20 asked the court to charge the jury that the appellant was charged in the indictment with a failure to report for induction and his intent to refuse to submit to induction in event he reported could not be considered by the jury in determining whether he had criminal intent in not reporting for induction.

There was evidence that was developed at the trial by the Government that appellant, even if he would have reported, would not have submitted to induction. This evidence was undoubtedly prejudicial. Without some instruction from the court to guide the jury it may have greatly harmed him before the jury on the issue of knowingly re-

fusing to report for induction, the only charge in the indictment.

Appellant was charged with failure to report for induction. The jury undoubtedly took a cavalier attitude toward the defense of the case of not knowingly refusing to report for induction. The jury probably considered that it was useless to acquit on a charge of failure to report, when the appellant would have to be re-indicted for refusal to submit to induction. In other words, if he would later on be guilty of another offense, he may as well be convicted for this charge of which he was not guilty.

In such a critical situation, as was developed in the evidence, it was the responsibility of the district court to give the appellant's theory on his intent not to submit to induction as being no evidence of an intent not to report for induction. The Court should bear in mind that previously appellant had reported and refused to submit. He was entitled to have the jury consider the case on the basis of the charge, to-wit, failure to report for induction and not convict him because he had intended not to submit if he had reported. This refusal of the district court constituted reversible error.

The appellant was entitled to have his affirmative defenses considered by the jury. The trial court did not give the jury any opportunity to consider anything except the Government's theory of the case.

CONCLUSION

It is submitted that for the reasons above stated, this Court ought to reverse and remand the case to the trial court with instructions to grant the motion for judgment of acquittal and to render and enter a judgment of acquittal as prayed for in the motion; or, in the alternative, this Court ought to reverse and remand the case to the trial court for a new trial because of the errors committed by

the trial court (1) in the charge to the jury and (2) in refusing to give the defendant's requested instructions upon the appellant's theory of the case, which was never put to the jury.

Respectfully,

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July, 1958.

No. 15953.
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CARLIN CONSTANTINE VENUS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 15953.
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CARLIN CONSTANTINE VENUS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

Appellant was found guilty on November 15, 1957, after trial by jury in the United States District Court for the Southern District of California, Southern Division, of knowingly failing to report for induction into the armed forces of the United States in violation of Section 462(a), Title 50 Appendix, United States Code. [Tr. 3-4, 164.]¹ Sentence was imposed on December 2, 1957. [Tr. 20-21.] The District Court had jurisdiction under Section 3231, Title 18, United States Code. Appellant filed notice of appeal on December 6, 1957, in the manner required by law. [Tr. 21-22.] This Court has jurisdiction under Section 1291, Title 28, United States Code, and Rules 37 and 39 of the Federal Rules of Criminal Procedure.

¹Tr. refers to the Transcript of Record; SSF refers to appellant's Selective Service File, Government Exhibit 1.

Statement of the Case.

September 15, 1948. Appellant registered with Local Board No. 140 in San Diego County giving 184 National Avenue, Chula Vista, California, as his mailing address. [SSF 1-2.]²

May 16, 1949. Appellant filed a Classification Questionnaire, SSS Form 100, with the Local Board stating that he was not a minister and indicating that he was not a conscientious objector. [SSF 4-10.]

July 11, 1950. Classified 1-A. [SSF 11.]

July 14, 1950. Notice of Classification, Form 110, mailed to appellant at 184 National Avenue, Chula Vista, California. Returned to Local Board marked "Not at this address." [SSF 11, 18-19.]

May 24, 1950. Appellant married Joan Marilyn Norlander. [SSF 17.]

October 27, 1950. Classified III-A. [SSF 11.]

November 7, 1951. Reclassified 1-A. [SSF 11.]

November 13, 1951. Local Board received postcard from appellant saying: "I received my 1-A classification November 8, 1951, Friday. Would you please send me a conscientious objector form as soon as possible." This was the first indication that appellant might claim to be a conscientious objector. [SSF 22-23.] November 13, 1951. Appellant again wrote to Local Board, saying: "Due to training (Bible) and belief I would appreciate having you give me form 150." [SSF 14.]

²SSF page references 1-13, inclusive, and 22-23 refer to the penciled circled numbers; other page references are to underlined penciled numbers.

November 19, 1951. Appellant filed Special Form for Conscientious Objector, Form No. 150, with Local Board. [SSF 30-47.]

December 17, 1951. Revised Special Form for Conscientious Objector filed. [SSF 52-57.]

January 9, 1952. Classified 1-A-O, available for non-combatant military service. [SSF 11.]

February 11, 1952. Appellant appeared before Local Board. [SSF 63-64.]

February 27, 1952. Classified II-A, occupational deferment. [SSF 11.]

September 24, 1952. Reclassified 1-A. [SSF 11.]

October 15, 1952. Reclassified II-A. [SSF 11.]

January 7, 1953. Reclassified 1-A again. [SSF 11.]

January 19, 1953. Appellant filed notice of appeal from 1-A classification. [SSF 76.]

January 23, 1953. Local Board forwarded Selective Service File to Appeal Board. [SSF 13.]

February 19, 1953. Appeal Board sent file to Department of Justice for an advisory opinion. [SSF 80.]

September 18, 1953. Appeal Board sent Local Board a form on which to report registrant's last change of address. [SSF 81.]

September 21, 1953. Local Board sent form to Appeal Board, stating that appellant had changed his address to 650 11th St., San Diego, California. [SSF 81.]

September 23, 1953. Appeal Board notified Department of Justice of appellant's new address. [SSF 82.]

March 23, 1954. Department of Justice recommended to the Appeal Board that appellant's conscientious objector

claim not be sustained. The recommendation was based, in part, on fact that appellant "admitted that he swore to a complaint for incompatibility for a divorce action against his wife, which was false." [SSF 83-85.]

April 9, 1954. Appeal Board classified appellant 1-A. [SSF 90.]

April 13, 1954. Appeal Board returned file to Local Board. [SSF 13.]

May 4, 1954. Local Board ordered appellant to report for induction on May 19, 1954. [SSF 89.]

May 20, 1954. Appellant reported but refused to be inducted. [SSF 13, 91-92, 94-95.]

May 26, 1954. Local Board ordered appellant to appear for an interview on June 3, 1954. [SSF 93.]

June 3, 1954. Appellant appeared. [SSF 96-97.]

June 7, 1954. Appellant wrote to the Local Board by registered letter, saying: "At this time I wish to inform you of my departure from San Diego to Modesto, Calif. because of secular employment. The Federal Bureau of Investigation I have notified, when in Los Angeles after induction procedures. My new address is (Same Employer) 1431 10th St., Modesto, Calif., but can be reached within one or two days at my San Diego address." [SSF 147-148.]

June 18, 1954. Local Board sent appellant's Selective Service File to State Director. [SSF 13, 149.]

August 9, 1954. State Director told Local Board that National Director had decided that appellant should be prosecuted. [SSF 150.]

August 11, 1954. Selective Service File returned to Local Board by State Director. [SSF 13.]

August 27, 1954. Local Board reported to the United States Attorney that appellant was delinquent for refusing induction. [SSF 151.]

September 9, 1954. Local Board sent appellant's Selective Service File to State Director for photostating. [SSF 13, 154.]

September 20, 1954. State Director returned Selective Service File to Local Board. [SSF 13.]

November 2, 1954. Local Board sent Selective Service File to Headquarters, Southern Area, Selective Service System in Los Angeles. [SSF 157.]

November 26, 1954. Headquarters, Southern Area, forwarded Selective Service File to State Director in Sacramento. [SSF 162.]

January 4, 1955. State Director returned Selective Service File to Headquarters, Southern Area. [SSF 164.]

July 11, 1955. Headquarters, Southern Area, returned Selective Service File to Local Board. [SSF 13, 168.]

August 4, 1955. United States Attorney advised Local Board that indictment against appellant had been dismissed because of the recent decision of the Supreme Court in *Gonzales v. United States*, 348 U. S. 407. [SSF 170.]

October 28, 1955. Local Board again ordered appellant to report for induction, this time on November 8, 1955; Order sent to appellant's last known address, 1431 10th St., Modesto, Calif. [SSF 172.]

November 8, 1955. Appellant failed to report. [SSF 13, 176.]

January 3, 1956. Local Board reported appellant to United States Attorney as delinquent for failure to report for induction. [SSF 13, 176.]

I.

The Appellate Court Should View the Evidence Most Favorably to the Government.

An Appellate Court should not weigh the evidence or pass on the credibility of witnesses. Therefore, a conviction should be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.

United States v. Glasser, 315 U. S. 60, 80 (1942);

Dean v. United States, 246 F. 2d 335, 336-337 (8th Cir., 1957);

United States v. Brown, 236 F. 2d 403, 405 (2d Cir., 1956);

Arena v. United States, 226 F. 2d 227, 229 (9th Cir., 1955), cert. den. 350 U. S. 954 (1956);

Schino v. United States, 209 F. 2d 67, 72 (9th Cir., 1953), cert. den. 347 U. S. 937 (1954);

Woodward Laboratories v. United States, 198 F. 2d 995, 998 (9th Cir., 1952);

O'Leary v. United States, 160 F. 2d 333 (9th Cir., 1947).

Despite this well-established rule, appellant sets forth the evidence and the inferences which might reasonably be drawn therefrom most unfavorably to the government and proceeds on the theory that the jury believed appellant's testimony and that of his witnesses. The error in this reasoning is set forth in *Dean v. United States, supra*, as follows:

"The jury having returned verdicts of guilty, we must assume that all conflicts in the evidence were resolved in favor of the government and, as we have often said, the prevailing party is entitled to the bene-

fit of all such favorable inferences as may reasonably be drawn from the facts proven and if, when so considered, reasonable minds might reach different conclusions the issue is one of fact to be submitted to the jury and not one of law to be determined by the court."

Appellant attempts to get around this principle by beginning the first three points of his argument with a statement of what the "undisputed evidence" shows. The Government contends (1) that the evidence was not undisputed, (2) that the Government's evidence on each point was substantial and (3) that, under the principle set forth above, the conviction must be sustained.

II.

Substantial Government Evidence Shows That the Local Board Mailed the Order to Report for Induction and That the Defendant Received It.

Appellant states that "the undisputed evidence shows that the order to report for induction was not actually deposited in the mails." (Appellant's Br. p. 29.)

This statement should be compared with the testimony of Mrs. Haisch, the clerk of appellant's local board, to the effect that she prepared the original order; that a board member signed it; that she placed the order in an envelope bearing appellant's last known address, 1431 10th Street, Modesto, California; that she put the envelope in an office mail box; that it was the custom of the local board for one of the clerks to deposit the mail from the office mail box in a post office mail box at the end of each day; that the envelope had the words "Selective Service System Official Business" printed on the top; that the envelope had the return address of the local board stamped

on it; and that the order was never returned to the local board. [Tr. 29-37, 39-41.]

This evidence and the inferences which might reasonably be drawn from it show that the order was mailed and that the defendant received it. As stated in Section 95 of Wigmore on Evidence (3rd Ed.):

“The fixed methods and systematic operation of the *Government’s postal service* have long been conceded to be evidence of the due delivery to the addressee of mail matter placed for that purpose in the custody of the authorities. . . . The habit of a *commercial house*, maintaining systematically a mailing system or other transmission system is equally relevant. . . . The same application of the principle would admit any person’s usual course of *business practice* to evidence *any act of delivery or transmission*, such as the sending of a notice, or the placing of letters in the mailbox; the only differences are, first, that the fact of the government system will be judicially noticed without further evidence . . . and secondly, that the course of business of an individual may under the circumstances not appear sufficiently fixed to be of probative value. A consequence of the combination of these two applications is that, upon proper evidence of the habit of an individual commercial house as to the addressing and mailing, the mere *execution* of a letter in the usual course of business may be evidence of its subsequent receipt by the addressee.”

That this is true in a criminal case is shown in *United States ex rel. Helmecke v. Rice*, 281 Fed. 326 (S. D. Tex., 1922). Helmecke was convicted of desertion by a court martial after having been lawfully inducted into the military service. He brought a writ of habeas corpus on

the grounds that he had never been inducted and therefore the military court did not have jurisdiction. The Supplementary Rules and Regulations in effect when Helmecke was inducted provided that the Adjutant General should mail a notice to prospective inductees informing them that they had been selected for military service and ordering them to report to the Adjutant General on a date specified. The Rules and Regulations further provided that: "From the date so specified, each man to whom such notice shall have been mailed shall be in the military service of the United States."

The only evidence of mailing in the *Helmecke* case was testimony on the custom in the Adjutant General's office. Yet, the Court held that the military had jurisdiction.

Said the Court:

"The better rule, and that which seems to be established by the weight of authority, is that in the absence of direct evidence there must be proof of an invariable custom or usage in an office of depositing mail in a certain receptacle, that the letter in question was deposited in such receptacle, and in addition there must be testimony of the employee, whose duty it was to deposit the mail in the post office, that he either actually deposited that mail in the post office, or that it was his invariable custom to deposit every letter left in the usual receptacle, and that he never failed in carrying out that custom. The law in the case is well stated in *Wm. Gardam & Son v. Batterson*, 198 N. Y. 175, 91 N. E. 371, 139 Am. St. Rep. 806, reported and annotated in 19 Ann. Cas. 651, while perhaps the best considered cases on the subject are the opinions of Judge Johnson, of the Kansas City Court of Appeals of the state of Missouri, in *Goucher v. Carthage Novelty*

Co., 116 Mo. App. 99, 91 S. W. 447, and Sills v. Burge, 141 Mo. App. 148, 124 S. W. 606.

* * * * *

“There is no doubt that, except for the fact that there is no direct evidence that this particular letter to Helmecke was prepared and placed in an envelope for mailing, correctly addressed, the testimony in this case measures not only fully, but exactly, up to the requirements of all the adjudged cases. Here is proof in the most meticulous and satisfactory way of an invariable custom or usage in an office of depositing mail in a certain receptacle, and in an equally accurate and meticulous way that all mail deposited in that receptacle was by the employee whose duty it was to deposit it in the post office, so deposited.

“Can it be said that the evidence is wanting in proof of the other requisite, that the letter in question was deposited for mailing in the receptacle? On this point I think there can be little doubt. The existence of a carbon requires the existence of the original, and proof that a carbon existed requires the inference that an original also existed. It is therefore indisputably true that there was made an original and a carbon of the Helmecke notice, just as in other cases.

“It is true there is no proof that the original was signed or mailed, but there is direct proof that the carbon was placed in the delinquent’s file, and there kept, as was the invariable custom with reference to mailing delinquent notices, and there is proof that the original was never separated from the carbon until it was placed in the envelope for mailing. Can it be that such circumstances as these are insufficient to establish the ultimate fact that the original was prepared and placed in the letter for mailing? I think not.

“In 22 Corpus Juris, p. 99, it is said:

“‘In order to support a presumption of the receipt of a letter, there must be satisfactory proof that it was duly mailed although such proof need not consist of direct and positive testimony of the ultimate fact of mailing.’

“In 10 Ruling Case Law, §196, it is said:

“‘Generally speaking, issues may be established in both civil and criminal cases by circumstantial evidence’

—and that conviction for the greatest crimes and matters of the gravest importance may rest alone on circumstantial evidence is too well known to require the citation of authorities.”

Appellant attempts to distinguish the *Helmecke* case on the grounds that the Court there held that “there was substantial evidence sufficient to find that the order was mailed, but here there is no positive proof about any custom of depositing in the mails.” (Appellant’s Br. p. 31.)

This statement should be compared with the following testimony of Mrs. Haisch:

“Q. Now, do you actually recall mailing this particular order? A. Yes, I do, because I knew Mr. Venus, and I remembered mailing it.

Q. And do you have a regular mail box that you put all your mail in? A. Yes.

Q. And on this occasion did you put this particular letter in that box? A. I can’t say that I put it in the mail box. I put it in the box in our office, mail box in our office.

Q. Who picks the mail up from the mail box in your office? A. Usually one of us clerks takes the

mail over and puts it in the box before or at the close of business for the day.

Q. You have a specific receptacle in your office then where you put all your out-going mail? A. Yes, that is correct.

Q. Who goes and gets the mail out of the receptacle? A. One of the clerks puts the mail together, bundles it and puts a rubber band around it. The out-going mail, we put "Out of Town" on it, and the local, we put a local—little something that is furnished to us by the post office. And we put rubber bands around them. And one of the clerks is responsible for the mailing of all our mail." [Tr. 39-40.]

Appellant also states that the Government witness said "that she did not do it [actually mail the envelope] and that it was not her duty." (Appellant's Br. p. 31.) The Court should note that nowhere in the record did Mrs. Haisch testify that it was not her duty to actually deposit the envelopes in a post office mail box. She only admitted that she did not recall putting this particular letter in such box. [Tr. 40.]

There is a further reason why the Court should hold that there was substantial evidence showing that the local board mailed the order. As stated in Section 2534 of Wigmore on Evidence, 3rd edition:

"The general experience that a rule of official duty or a requirement of legal conditions, is fulfilled by those upon whom it is incumbent has given rise occasionally to a *presumption of due performance of official duty.*"

The mailing of the order was one of the local board's official duties. This is shown by Section 1632.1 of the

Selective Service Regulations, 32 C. F. R., Section 1632.1, which provides that:

“Immediately upon determining which men are to report for induction, the local board shall prepare for each man an Order to Report for Induction (SSS Form No. 252) in duplicate. The date specified for reporting for induction shall be at least 10 days after the date on which the Order to Report for Induction (SSS Form No. 252) is mailed, . . . The local board shall mail the original of the Order to Report for Induction (SSS Form No. 252) to the registrant and shall file the copy in his Cover Sheet (SSS Form No. 101).”

The presumption of due performance of official duty has been used in at least two Selective Service cases to sustain convictions.

United States v. Fratricks, 140 F. 2d 5 (7th Cir., 1944);

Koch v. United States, 150 F. 2d 762 (4th Cir., 1945).

III.

Substantial Government Evidence Shows That the Order Was Sent to the Correct Address.

The appellant and his witness, Mr. Edwin Beil, testified that appellant mailed a postcard in Los Angeles in February, 1955. Appellant testified that it was unregistered and addressed to his local board notifying them of a change of address to 1120 30th Street, San Diego, California. [Tr. 63-64, 76, 95-103.] Therefore, appellant concludes that “the undisputed evidence shows that Venus sent a postcard, addressed to the local board, through the mails.” (Appellant’s Br. p. 32.)

This conclusion should be compared with the following testimony of Mrs. Haisch:

“Q. (By Mr. Duncan): Mrs. Haisch, after June 7th, 1954, and before October 28th, 1955, did you receive any other letters indicating another address from the defendant? A. Yes. Let's see. We received one on April 10, 1956.

Q. Is that the next letter you received, to your knowledge? A. The change of address; yes, sir.

Q. Now, every letter and every bit of correspondence concerning a registrant goes in that file, doesn't it? A. Yes, it does.

Q. That is part of your job, to put those things in that file? A. Yes, sir.

Q. To the best of your knowledge, every document and every letter concerning this defendant is in that file, isn't it? A. Yes, it is.

Mr. Duncan: I have nothing further.” [Tr. 36-37.]

This evidence and the inferences which might reasonably be drawn from it shows that the defendant did not mail a change of address in February, 1955, or at any time between June 7, 1954, and October 28, 1955.

In this connection the Court should note that appellant notified the local board of his changes of address on June 7, 1954, and in September, 1956 by registered mail. [Tr. 76-79.]

Appellant states that the testimony of Mrs. Haisch “may be completely disregarded because the file was out of the possession of the local board at the time the card was mailed in February 1955.” (Appellant's Br. p. 33.)

This statement overlooks the efficiency with which the employees of the local board customarily performed their duties. For example, defendant filed notice of appeal from 1-A classification on January 19, 1953. [SSF 76.] The Local Board forwarded the Selective Service File to the Appeal Board on January 23, 1953. [SSF 13.] The Appeal Board forwarded the file to the United States Attorney on February 19, 1953. [SSF 80.] On July 13, 1953 defendant notified the local board of a change of address to 650 11th Street, San Diego, California. [SSF 78.] On September 21, 1953 the local board advised the Appeal Board of the change. [SSF 81.] Two days later, on September 23, 1953, the Appeal Board notified the United States Attorney. [SSF 82.] Thus, there is a clear showing that on a prior occasion a change of address was properly placed in defendant's Selective Service File even though the file was out of the possession of the local board at the time the notice was mailed.

IV.

Substantial Government Evidence Shows That Appellant Knowingly Failed to Report on the Date Alleged in the Indictment.

The Government's evidence shows that the local board mailed the order to report and that the appellant received it. The necessary criminal intent, that he "knowingly" failed to report, may be inferred from such proven facts and circumstances.

Silverman v. United States, 220 F. 2d 36, 40 (8th Cir., 1955).

V.

Sections 1641.3 and 1642.2 of the Selective Service Regulations Are Not Unconstitutional as Construed and Applied Because They Did Not Deny Appellant Due Process of Law Contrary to the Fifth Amendment.

Section 1641.3, 32 C. F. R., Section 1641.3, provides that:

“Communication by Mail.—It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not.”

Section 1642.2, 32 C. F. R., Section 1642.2, further provides that:

“Continuing Duty.—When it becomes the duty of a registrant or other person to perform an act or furnish information to a local board or other office or agency of the Selective Service System, the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act or the supplying of incorrect or false information shall in no way operate as a waiver of that continuing duty.”

Appellant contends that “under all the facts and circumstances of this case, Section 1641.3, which imposes constructive notice upon appellant of the outstanding order to report for induction, and Section 1642.2, which commands him to comply with the outstanding order from day to day, of which he had no knowledge, . . . constitute a deprivation of procedural due process of law,

contrary to the Fifth Amendment.” (Appellant’s Br. p. 36.) Appellant’s argument is based solely upon his statement that “the undisputed evidence shows that Venus did not receive the order to report and that he did not learn about it until April, 1956, when he was contacted by the F.B.I. agent.” (Appellant’s Br. pp. 35-36.)

The evidence to the contrary has already been set out in Section II of this Brief.

The Court should note, however, that regulations similar to Section 1641.3 have been held valid in numerous decisions.

Ex parte Bergdall, 274 Fed. 458, 466 (D. Kans., 1921);

United States v. Bullard, 290 Fed. 704, 711 (2nd Cir., 1923);

United States ex rel. Bergdall v. Drumm, 107 F. 2d 897, 901 (2nd Cir., 1939);

Ex parte Caplis, 275 Fed. 980, 988 (W. D. Tex., 1921).

VI.

The District Court Did Not Commit Reversible Error in Charging the Jury That the Appellant Had a Continuing Duty to Report After November 8, 1955.

The District Court charged the jury that they could find the defendant guilty if they found “that . . . [he] knowingly failed to report at any time between November 8, 1955, and August 8, 1957, the date of the return of the Indictment.” [Tr. 146.]

This was not reversible error. The Indictment charged that “the defendant was classified in Class 1-A and was notified of said classification and a notice and order by said board [Local Board No. 140] was duly given to

him to report for induction into the armed forces of the United States of America on November 8, 1955, in San Diego County, California, . . . and at said time and place . . . defendant knowingly failed and neglected to report . . .” [Tr. 3-4.]

32 C. F. R., Section 1632.14(a), provides that:

“When the local board mails to a registrant an Order to Report for Induction . . ., it shall be the duty of the registrant to report for induction at the time and place fixed in such order . . . Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuing duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains.”

See also Section 1642.2, *supra*.

A jury instruction similar to the instant one, based on Section 1642.2, *supra*, was upheld in *Silverman v. United States*, 220 F. 2d 36 (8th Cir., 1955). The Court there said:

“The case was submitted to the jury upon the theory that although the indictment charged the failure to report for induction on June 6, 1951, the offense of failing to report, if in fact it was knowingly committed, was a continuing one. The jury was instructed that if the defendant ‘knowingly’ failed to report at any time between June 6, 1951, and the date of the return of the indictment, he might be convicted of the offense as charged. Defendant contends that, if committed, the offense was complete on June 6, 1951, and that to treat it as a continuing offense was error. It is argued that the mere continuance of the result of the alleged crime does not continue the crime. *Pendergast v. United*

States, 317 U. S. 412, 63 S. Ct. 268, 87 L. Ed. 368; United States v. Kissel, 218 U. S. 601, 31 S. Ct. 1240, 54 L. Ed. 1168; Fiswick v. United States, 329 U. S. 211, 67 S. Ct. 224, 91 L. Ed. 196; and United States v. Irvine, 98 U. S. 450, 25 L. Ed. 193, are cited in support of this contention. All of those cases dealt with the application of statutes of limitation. Although there was only one offense charged, that offense was failure to report for induction. By the Selective Service Regulations, §1642.2, 32 C. F. R., it is made a continuing offense. No assault is made upon this regulation. The nature of the offense charged is such that it may upon proper proof be a continuing one. Ledbetter v. United States, 170 U. S. 606, 18 S. Ct. 774, 42 L. Ed. 1162; United States v. Kissel, 218 U. S. 601, 31 S. Ct. 124, 54 L. Ed. 1168. The offense charged and proved was a continuing one. There was no error in so instructing the jury."

The *Silverman* case was an application, supported by regulations, of the well-established rule of law that it is not necessary to prove an offense was committed on the exact day alleged. It is sufficient to prove that the offense was committed at any time prior to the return of the indictment and within the statute of limitations.

Ledbetter v. United States, 170 U. S. 606, 612, 18 S. Ct. 774 (1898);

Weeks v. Zerbst, 85 F. 2d 996 (10th Cir., 1936);

United States v. Reisley, 32 Fed. Supp. 432, 434, 435 (D. N. J., 1940);

Lucas v. United States, 188 F. 2d 627, 628 (D. C. Cir., 1951);

Berg v. United States, 176 F. 2d 122, 126 (9th Cir., 1949);

Lelles v. United States, 241 F. 2d 21, 25 (9th Cir., 1957).

VII.

**The District Court Did Not Commit Reversible Error
in Failing to Give Defendant's Requested Instruc-
tions Nos. 12, 13, 14, 15 and 21.**

The points raised in the requested instructions were properly covered by Government's Instructions Nos. 4 and 5 wherein the jury was instructed that in order to find the defendant guilty they must find:

"That the defendant was ordered by said Board to report for induction into the armed forces of the United States on November 8, 1955, in San Diego County, California.

"That the defendant did on such date, and at all times thereafter, knowingly failed to report for induction.

"The word 'knowingly' as used in the Indictment can be taken only as meaning deliberately and with knowledge and not something which is merely careless or negligent or inadvertent." [Tr. 145.]

Furthermore, defendant's instructions Nos. 12 and 13 did not state the correct law.

32 C. F. R., Sec. 1641.3;

United States ex rel. Helmecke v. Rice, supra;
Wigmore, 3rd Ed., Sec. 95.

Lastly, if there were error, it did not affect substantial rights and should be disregarded.

F. R. C. P., Rule 52.

VIII.

**The District Court Did Not Commit Reversible Error
in Failing to Give Defendant's Instructions Nos.
18, 19, 23 and 25.**

The point raised in Defendant's Instruction No. 18 was properly covered in Government's Instructions Nos. 4 and 5, *supra*.

Defendant's Instructions Nos. 19 and 23 do not correctly state the law.

Silverman v. United States, supra;
32 C. F. R., Secs. 1632.14, 1642.2.

Defendant's Instruction No. 25 does not correctly state the law.

32 C. F. R., Secs. 1632.14, 1642.2.

Furthermore, if there were error, it did not affect substantial rights and should be disregarded.

F. R. C. P., Rule 52.

IX.

**The District Court Did Not Commit Reversible Error
in Refusing to Give Defendant's Instruction No. 20.**

The evidence that the appellant, even if he had reported, would not have submitted to induction was brought out by defense counsel in cross-examination without objection. [Tr. 51.] Defendant's Instruction No. 20, asking the jury to disregard any such evidence, was, in form, a motion to strike and comes too late.

Wigmore, 3rd Ed., Sec. 18.

Also, if there were error, it did not affect substantial rights and should be disregarded.

F. R. C. P., Rule 52.

Conclusion.

1. The evidence should be viewed most favorably to the Government.
2. There was substantial evidence showing that the local board mailed the order to report and that appellant received it.
3. There was substantial evidence showing that appellant knowingly failed to report on the date alleged in the indictment.
4. The Court did not commit reversible error in instructing, or failing to instruct, the jury.
5. The verdict of the trial court should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division,

ROBERT D. HORNBAKER,
Assistant U. S. Attorney,
Attorneys for Appellee.

No. 15953

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARLIN CONSTANTINE VENUS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

LAUGHLIN E. WATERS,
United States Attorney,

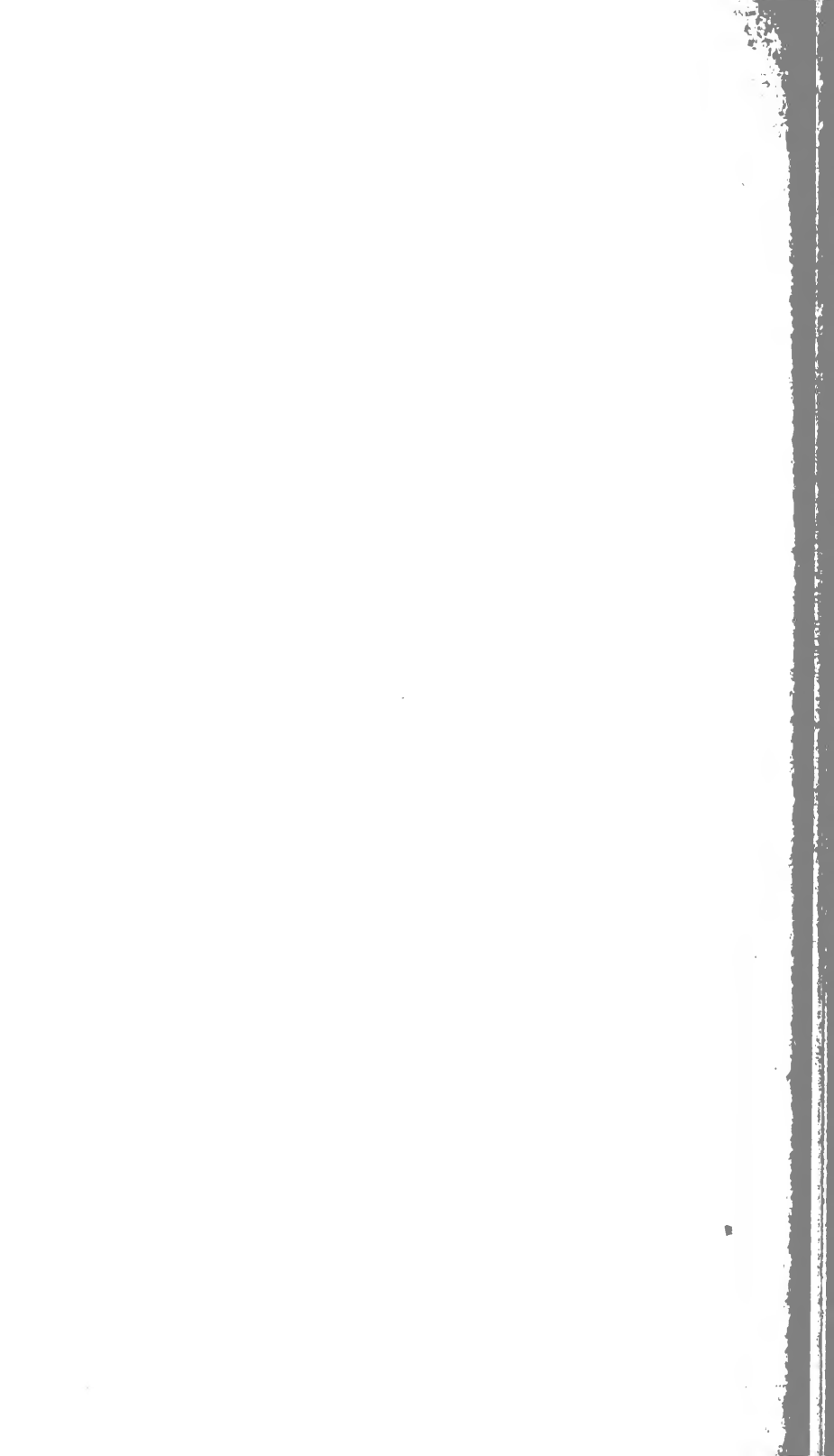
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PAUL P. O'BRIEN, CLERK



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No. 15953
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CARLIN CONSTANTINE VENUS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

To the Honorable James Alger Fee, Richard H. Chambers, and Stanley N. Barnes:

The appellee hereby petitions this Honorable Court for a rehearing of the within appeal.

Jurisdictional Statement.

The appellant was convicted by a jury trial in the United States District Court for the Southern District of California, Southern Division, and on January 8, 1959, the judgment on appeal reversing the conviction was filed by this Honorable Court.

Grounds for This Petition.

Appellee respectfully urges the Court to grant this Petition for Rehearing primarily on the grounds that the Court has misunderstood or has been misled and misad-

vised as to the duration of the continuing duty of this appellant to report for induction into the Armed Forces as ordered to do by his local board.

Preliminary Statement.

The necessary facts in the case for purposes of this Petition may be succinctly stated as follows:

November 8, 1955: Appellant ordered to report for induction.

December 19, 1955: Appellant became 26 years of age.

April 1956: Appellant claims he first learned of the order to report for induction.

This Court recognized, acknowledged and affirmed the proposition that appellant had a continuing duty to report for induction.

“The trial court laid great weight in the instructions upon the continuing duty of Venus to report for induction after the critical date specified in the order. We take no exception to this instruction standing alone. *There is generally such a duty.*” (Emphasis ours; p. 3 of the slip opinion of the judgment on appeal.)

This Court then undertook to ascertain the duration of this continuing duty.

(Quotation No. One)

“There is doubt whether there was any machinery by which he (appellant) could have been legally inducted subsequent to that date (the date appellant became 26).” (Pp. 3-4, slip opinion of judgment on appeal.)

(Quotation No. Two)

“It is perfectly plain that no one connected with the Local Board would send him (appellant) to an army receiving station: first, because he was over twenty-six years of age when he wrote to the Board in April 1956, and no one knew then and no one pretends to advise this Court now as to whether the Board had authority to order him to report for induction after he had attained the age, . . .” (P. 4, slip opinion of judgment on appeal.)

(Quotation No. Three)

“There was also a continuing duty to report certainly on November 8, 1955, and thereafter for some considerable time, if Venus obtained knowledge of the terms of the order at a time when this obligation was incumbent upon him. But the duty to report was not unlimited. Venus became twenty-six years old on December 19, 1955.” (P. 5, slip opinion of judgment on appeal.)

Appellee respectfully urges that these three quotations from this Court's opinion are predicated upon misunderstanding of the applicable law and regulations or upon a lack of knowledge of the existence of a controlling fact present in the case but not called to the Court's attention, namely: That appellant, under the law and regulations, has extended liability to age 35 because he had received a deferment prior to attaining the age of 26.

Armed with this fact, appellee respectfully submits the answer to the questions raised in each of the “three quotations” above; first, there is no doubt that appellant could be legally inducted into the armed services after he became 26 years old because his liability to serve is extended to age 35; second, the Local Board does have authority to order appellant to report for induction after he attained

the age of 26; third, appellant's duty to report for induction continues past the age of 26 because appellant is liable for the draft until he becomes 35 years old. (Authorities cited below.)

It appears to appellee that, due to the above referred to misunderstanding or lack of factual knowledge, this Court was mistaken in its opinion, and this mistake permeates the entire judgment on appeal as it affected the Court's discussion on the jury instructions. Appellee submits that this Court would affirm the judgment below if it had been made aware of appellant's extended liability.

Argument and Authorities.

Appellant's Selective Service File [Ex. 1 in the trial court and part of the record on appeal] indicates that appellant had, *inter alia*, the following classifications:

1. October 27, 1950: Appellant was classified III-A and remained in this classification until November 7, 1951:
2. February 27, 1952: Appellant was classified II-A and remained in this classification until September 24, 1952;
3. October 15, 1952: Appellant was again classified II-A and remained in this classification until January 7, 1953.

These facts are not contested; in fact, they are set forth in Appellant's Brief on page 6.

50 U. S. C. A. Appendix 456(h) provides in pertinent part:

“(h) The President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces . . . of any or all categories of persons whose

employment in industry, agriculture, or other occupations or employment, . . .; *and provided further*, That persons who are or may be deferred under the provisions of this section shall remain liable for training and service in the Armed Forces . . . until the thirty-fifth anniversary of the date of their birth."

This law became effective on June 19, 1951. The Selective Service System acting under the authority of 50 U. S. C. A. Appendix 460 promulgated pertinent regulations pertaining to deferments as follows:

"32 C. F. R. 1622.1 *General principles of classification*. (a) The Universal Military Training and Service Act, as amended, provides that every male citizen of the United States . . . who is between the ages of 18 years and 6 months and 26 years, shall be liable for training and service in the Armed Forces of the United States, and that persons who on June 19, 1951, were, or thereafter are, deferred under the provisions of section 6 of such act shall remain liable for training and service until they attain the age of 35."

"32 C. F. R. 1622.22. *Class II-A: Registrant deferred because of civilian occupation (except agriculture and activity in study)*. In Class II-A shall be placed any registrant whose employment in industry, or other occupation or employment . . . is found to be necessary to the maintenance of the national health, safety, or interest."

"32 C. F. R. 16.2230. *Class III-A: Registrant with a child or children; and registrant deferred by reason of extreme hardship and privation to dependents*. . . . (b) In Class III-A shall be placed any registrant whose induction into the Armed Forces would result in extreme hardship and privation (1) to his . . . parent. . . ."

See also:

32 C. F. R. 1622.50.

It is clear from the foregoing law that appellant was in fact deferred on three separate occasions, and, thus, by law he has extended liability to age 35.

Judges Stephens, Fee, and Chambers had occasion to apply this law in *Kaline v. United States*, 235 F. 2d 54, 62 (1956). In that case the Court held that Regulation 32 C. F. R. 1622.50 "extended the liability of a registrant to age 35 if *at any time* on or after June 19, 1951, he was in a deferred class." (P. 63.)

This holding, applied to the instant case, gives rise to just one conclusion: Appellant has extended liability to age 35.

United States v. Cook, 225 F. 2d 71 (3 Cir., 1955), cert. den. 350 U. S. 937 (1956), dealt with this same question of extended liability to age 35 and, in essence, concluded that even though a registrant had passed his 26th birthday at the time he was ordered inducted, the induction was legal as the registrant had extended liability to age 35.

Conclusion.

Appellee respectfully concludes as follows:

1. Appellant was deferred prior to attaining the age of 26 years; hence, had extended liability to age 35.

2. Appellant had knowledge of the order to report for induction at a time when this obligation was incumbent upon him.

3. This Court misconstrued the law applicable to extended liability and continuing duty, and this misconstruc-

tion vitally affected this Court's discussion of the jury instructions.

4. This Court should grant appellee's Petition for Rehearing, and then affirm the judgment below or allow counsel for both sides to submit new briefs on the issue, followed by oral argument.

Respectfully submitted,

LAUGHLIN E. WATERS,

United States Attorney,

ROBERT JOHN JENSEN,

*Assistant U. S. Attorney,
Chief, Criminal Division,*

THOMAS R. SHERIDAN,

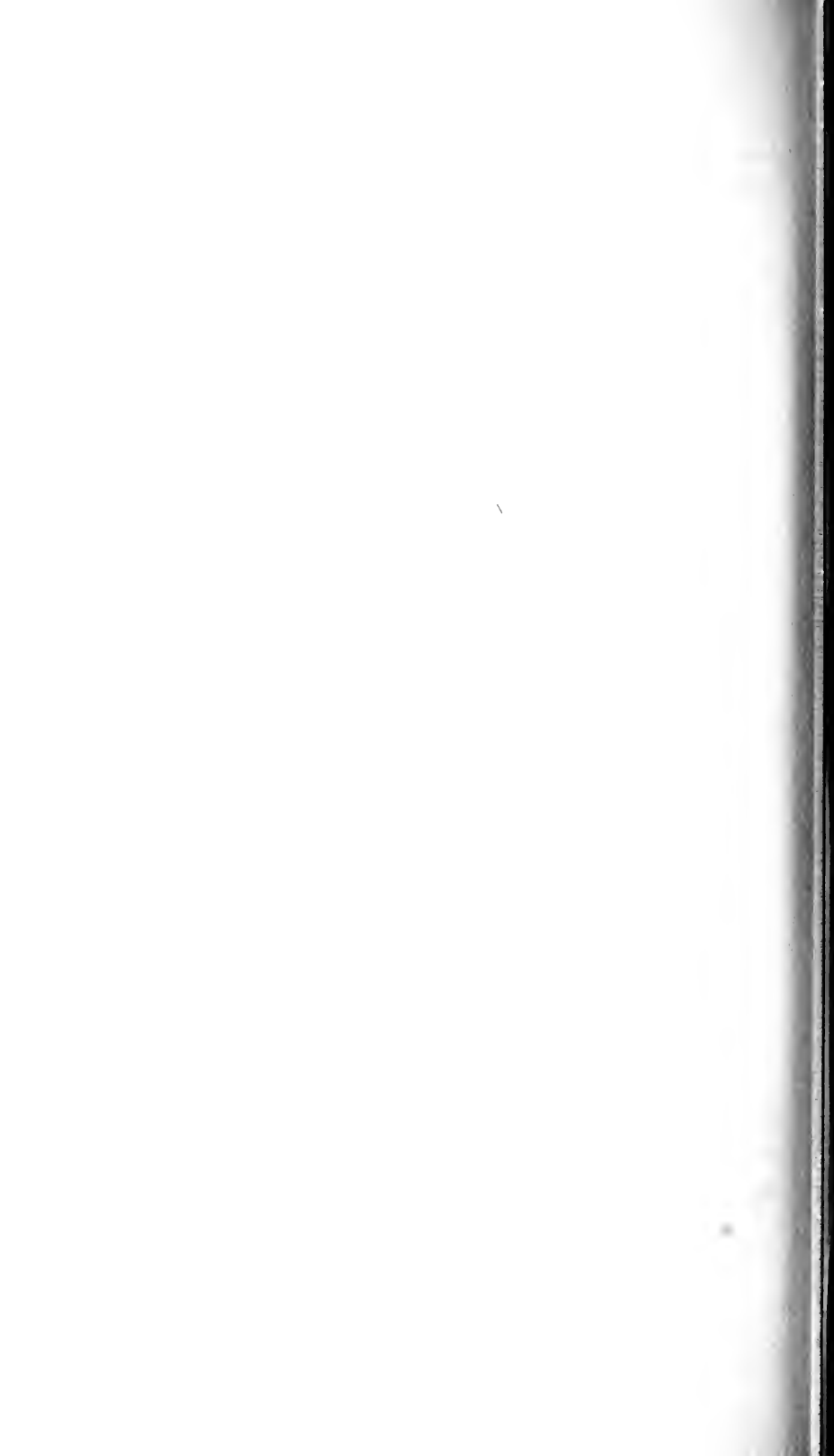
*Assistant U. S. Attorney,
Attorneys for Appellee,
United States of America.*

Certificate of Counsel.

Thomas R. Sheridan, one of the attorneys for the appellee, hereby certifies that in his opinion the above Petition for Rehearing is well founded and not interposed for delay.

THOMAS R. SHERIDAN,

Assistant U. S. Attorney.



No. 15963

United States
Court of Appeals
for the Ninth Circuit

CLAIRE B. MORSE,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

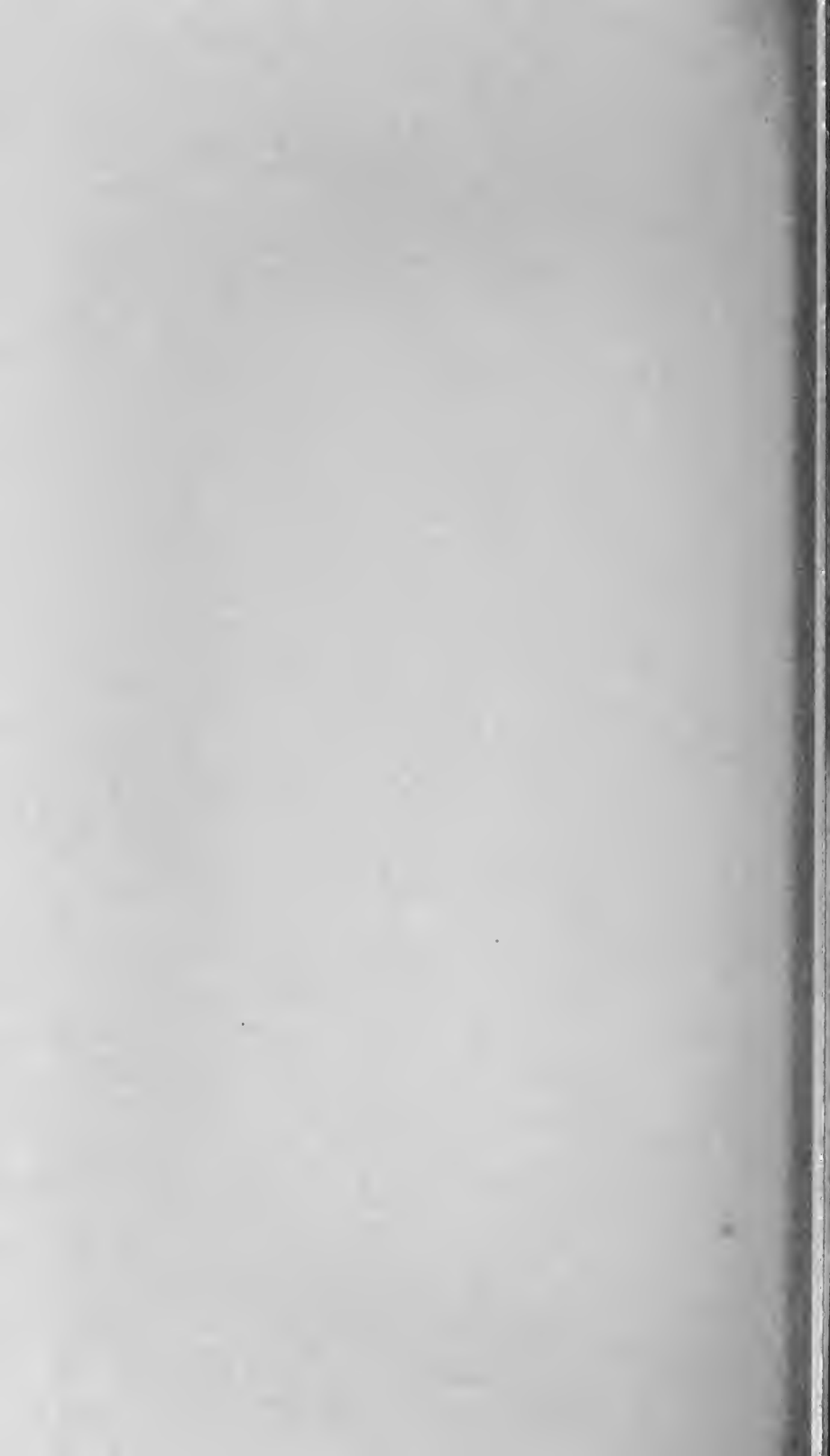
Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

FILED

JUL - 8 1958

PAUL P. O'BRIEN, CLERK



No. 15963

United States
Court of Appeals
for the Ninth Circuit

CLAIRE B. MORSE, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

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233 So. Beverly Drive,
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For Appellee:

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Assistant Attorney General,

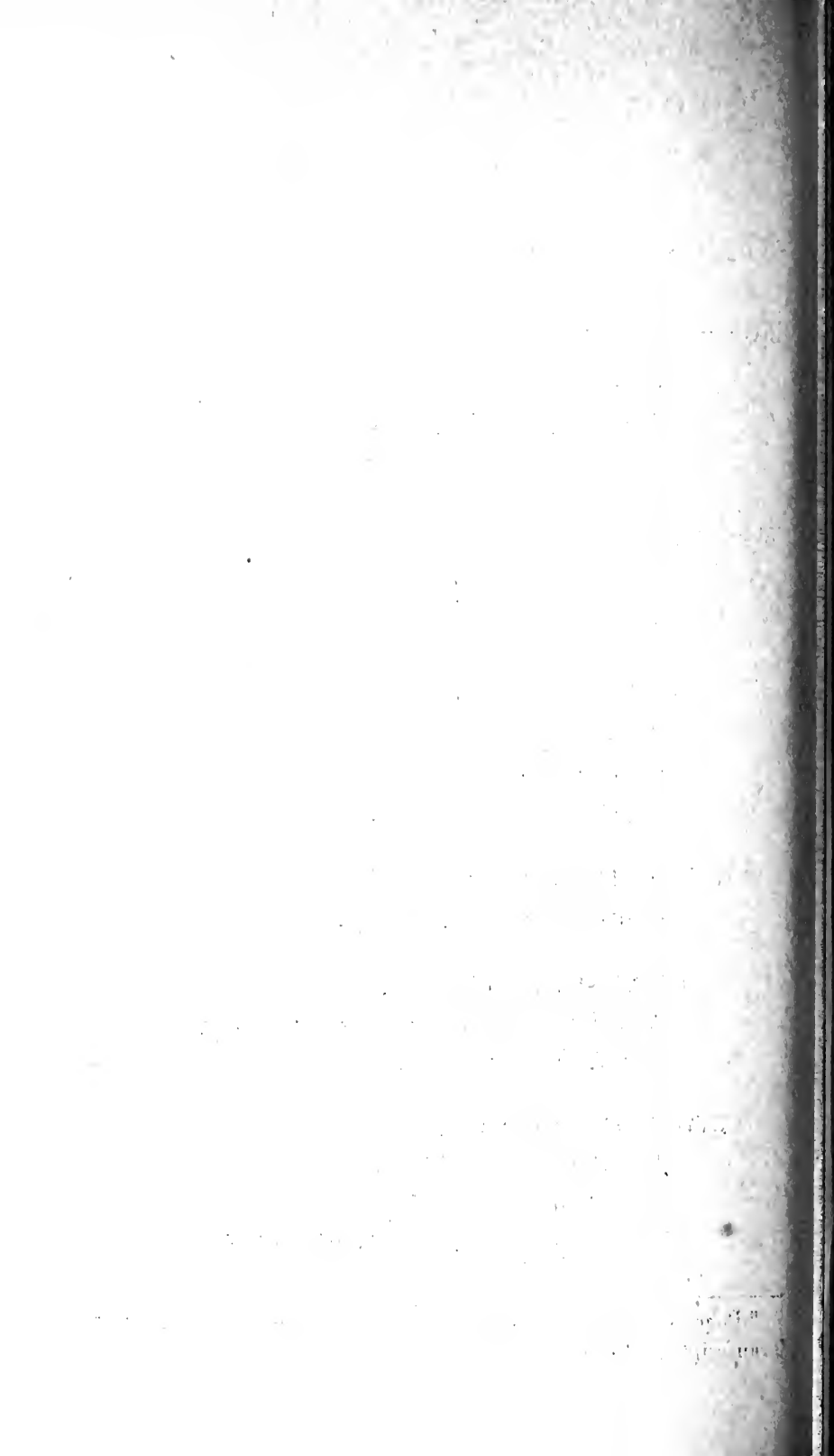
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Chief, Tax Division,

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Los Angeles 12, California. [1]*

* Page numbers appearing at bottom of page of Original Transcript of Record.



United States District Court, Southern District
of California, Central Division

No. 20638-HW Civil

CLAIRE B. MORSE, Plaintiff,

vs.

ROBERT A. RIDDELL, District Director of In-
ternal Revenue, Defendant.

UNITED STATES OF AMERICA,
Plaintiff in Intervention,

vs.

CLAIRE B. MORSE,
Defendant in Intervention.

COMPLAINT IN INTERVENTION OF UNITED
STATES OF AMERICA TO COLLECT
FEDERAL INCOME TAXES

Comes Now the United States of America, and
by leave of the Court, files this, its Complaint in
Intervention herein and alleges:

I.

That the United States of America is a sovereign
and corporate body politic.

II.

This action has been authorized by the Commis-

sioner of Internal Revenue and is brought under the direction of the Attorney General of the United States. [2]

III.

The Court has jurisdiction under Title 28, United States Code, Sections 1340 and 1345, and Title 26, United States Code, Section 7401.

IV.

The defendant in intervention resides at or near Los Angeles, Los Angeles County, California.

V.

Said Commissioner made an assessment against Borin Art Products Corporation, Chicago, Illinois, of declared value excess profits tax and excess profits tax, penalties and interest, for the calendar year 1942 and for the period January 1, 1943, through April 30, 1943, in the amount of \$110,334.97 and overassessment in income tax in the amount of \$2,046.98.

Said Commissioner certified the list of each of said assessments to the then Collector of Internal Revenue for the District of Chicago, Illinois, by whom notice was given to, and demand for payment of the amount thereof was made upon, said Borin Art Products Corporation. Said corporation paid no portion of said deficiencies.

VI.

Said Borin Art Products Corporation was dis-

solved, and on or about May 1, 1943, assets of said corporation were transferred to defendant in intervention in the amount of \$10,705.69.

VII.

Said Commissioner assessed against defendant in intervention, as transferee of assets of Borin Art Products Corporation, the amount set forth above, plus interest and penalties according to law, as follows: [3]

Taxable Period: Year 1942. Amount Assessed: \$11,177.24. Date of Assessment: June 15, 1951. Dates, Notices & Demands: June 26, 1951. Unpaid Balance: \$11,177.24.

Taxable Period: 1/1/43 thru 4/30/53. Amount Assessed: \$3,588.89. Date of Assessment: June 15, 1951. Dates, Notices & Demands: June 26, 1951. Unpaid Balance: \$3,588.89.

No part of any of said unpaid balances, totaling \$14,766.13, has been paid.

VIII.

Said defendant in intervention has, at various times, executed consents fixing period of limitation upon assessments of liability at law or in equity for income and profits tax against a transferee. One of said consents provided that the amount of liability as transferee might be assessed at any time on or before June 30, 1951. Said liability was assessed on June 15, 1951, as set forth in paragraph VII above.

IX.

It is alleged upon information and belief that on or about May 1, 1943, defendant in intervention, Claire B. Morse (then Claire Borin) took over and personally received property and things of value from said Borin Art Products Corporation of a value of not less than \$10,000 without giving anything of value in exchange therefor.

X.

Ever since the taking of said property and things of value, as alleged in paragraph V of this complaint in intervention, the said Borin Art Products Corporation was and is without property or things of value.

Wherefore, plaintiff in intervention prays:

1. That the defendant in intervention be required to account to this Court for all property and things of value taken over by her as alleged in paragraph X of this complaint in intervention.

2. That it be further adjudged and decreed that such property and things of value taken over as aforesaid constitute a trust fund for the payment of the tax liabilities alleged in this complaint in intervention.

3. That if the defendant in intervention no longer retains such property and things of value, taken over as aforesaid, that the plaintiff in intervention have and recover judgment for the amount of the value thereof or the amount of said tax

liabilities, whichever is the lesser, with interest thereon as provided by law.

LAUGHLIN E. WATERS,
United States Attorney,
EDWARD R. McHALE,
Asst. U. S. Attorney,
Chief, Tax Division,
JOHN G. MESSER,
Asst. U. S. Attorney,
/s/ JOHN G. MESSER,

Attorneys for Plaintiff in Intervention, United
States of America. [5]

It Is So Ordered this 31st day of May, 1957.

/s/ HARRY C. WESTOVER,
Judge.

Affidavit of Service by Mail Attached. [6]

[Endorsed]: Filed May 31, 1957.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT
IN INTERVENTION

Comes now the defendant in intervention, Claire B. Morse, by her attorney, George T. Altman, and files this answer to the complaint in intervention.

I.

Admits the allegations in paragraph I of the complaint in intervention.

II.

Admits the allegations in paragraph II of the complaint in intervention. [7]

III.

Admits the allegations in paragraph III of the complaint in intervention.

IV.

Admits the allegations in paragraph IV of the complaint in intervention.

V.

Defendant in intervention is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph V of the complaint in intervention.

VI.

Denies that assets of Borin Art Products Corporation were transferred to defendant in intervention in the amount of \$10,705.69, or in any other amount. Admits that corporation was dissolved.

VII.

Defendant in intervention is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph VII of the complaint in intervention. If any such assessment was made, then defendant in intervention denies that such assessment was lawfully made.

VIII.

Admits that she executed consents fixing period of limitation upon assessment and that one of said consents provided that the amount of liability as transferee might be assessed at any time on or before June 30, 1951. Denies that she had any such liability as transferee. As to each and every other allegation in paragraph VIII of the complaint in intervention, defendant in intervention states that she is without knowledge or information sufficient to form a belief as to the truth of each and every such allegation. [8]

IX.

Denies the allegations contained in paragraph IX of the complaint in intervention.

X.

Admits that from and after May 1, 1943, Borin Art Products Corporation was without property or things of value. Denies any taking of property or things of value and denies each and every other allegation contained in paragraph X of the complaint in intervention.

XI.

Answering further, defendant in intervention states that this proceeding in intervention is barred by the statute of limitations.

Wherefore, defendant in intervention prays that the complaint in intervention be dismissed with

prejudice and with costs to the defendant in intervention.

/s/ GEORGE T. ALTMAN,
Attorney for Defendant in
Intervention. [9]

Affidavit of Service by Mail Attached. [10]

[Endorsed]: Filed June 12, 1957.

[Title of District Court and Cause.]

PRE-TRIAL CONFERENCE ORDER

Following pre-trial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court, It Is Ordered: [11]

I.

This is an action by plaintiff for an order enjoining defendant from collecting taxes and interest assessed against plaintiff as alleged transferee of the assets of Borin Art Products Corporation, an Illinois corporation. This is also an action by plaintiff in intervention for recovery from defendant in intervention of the said taxes. The pleadings are as follows:

1. An amended complaint filed by plaintiff;
2. An answer to amended complaint filed by defendant;
3. A complaint in intervention filed by plaintiff in intervention;

4. An answer to said complaint in intervention filed by defendant in intervention;
5. A supplement to the said amended complaint;
6. An answer to the said supplement.

II.

Federal jurisdiction is invoked upon the following grounds:

1. Plaintiff, who is also defendant in intervention, is an individual now residing at Los Angeles, California.
2. Defendant is the District Director of Internal Revenue for the Sixth District of California.
3. The action involves federal taxes within the scope of 28 USC, Section 1340.

III.

The following facts are admitted and require no proof:

1. This is an action by plaintiff for an order enjoining defendant from collecting taxes and interest assessed against plaintiff as alleged transferee of the assets of Borin Art Products Corporation, an Illinois corporation, and an action by plaintiff in intervention for recovery of said taxes.
2. Plaintiff, who is also defendant in intervention, [12] is an individual residing at Los Angeles, California.

3. Defendant is District Director of Internal Revenue for the Sixth District of California.

4. The taxes involved are corporation income and excess profits taxes of the said Borin Art Products Corporation for the year 1942 and the period January 1st to April 30th, 1943, in the net amount for both years of \$10,705.69.

5. On April 30, 1943 the said corporation transferred all of its assets, subject to all of its liabilities, to an entity known as Borin Art Products Company.

6. After said date the said corporation had no assets or anything of value.

7. Prior to said transfer of assets the shareholders of said corporation transferred their stock in said corporation to the said entity, Borin Art Products Company, and at the time of said transfer of assets the said entity was the sole shareholder of said corporation.

8. No notice of deficiency in respect to said taxes was ever sent to plaintiff.

9. The said taxes were assessed on June 15, 1951.

10. Under a statement issued by the Treasury Department to plaintiff under date of March 30, 1950 and proposing the assessment of the said sum of \$10,705.69, it was alleged that assets were received by plaintiff from the said corporation as transferee in that amount.

11. The United States had previously assessed against plaintiff as alleged transferee of the said corporation because of the distribution of said corporation income and excess profits taxes for the years 1940 and 1941 in the total amount of \$12,000.00. The said amounts were subsequently paid in full by persons other than plaintiff.

12. By letter dated March 30, 1950, the Treasury Department advised plaintiff of an overassessment determined for [13] the years 1944, 1945, and 1946 in the individual income taxes of plaintiff, in the respective amounts of \$14,926.62, \$24,596.39, and \$200.00. The said letter stated that no return was filed for 1946. The said letter also stated, as a reason for the overassessment, that the income taxed to plaintiff as income from a partnership, Borin Art Products Company, was not her income but that of her husband, Nathan Borin.

13. No portion of the amount so assessed against plaintiff as said transferee has been paid by plaintiff.

IV.

The reservations as to the facts cited in Paragraph III above are as follows:

Defendant and plaintiff in intervention question the materiality of item 11.

V.

The following facts, though not admitted, are not to be contested at the trial by evidence to the contrary: None.

VI.

The following issues of fact, and no others, remain to be litigated upon the trial:

1. Whether plaintiff was ever in fact a shareholder in said Borin Art Products Corporation;
2. Whether plaintiff was ever in fact a member of said entity, Borin Art Products Company;
3. Whether said entity, Borin Art Products Company, was a bona fide limited partnership or was, on the contrary, a sham;
4. Whether said entity was the mere alter ego of Nathan Borin, the then husband of plaintiff;
5. Whether plaintiff ever received any money, property, or other thing of value from said corporation as transferee, after the said taxes had become a liability of said [14] corporation.

VII.

The exhibits to be offered at the trial, together with a statement of all admissions by and all issues between the parties with respect thereto, are as follows:

A. By defendant and plaintiff in intervention:

1. Form 874—"Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment". (Plaintiff will contend that her signature on the said document was obtained by representation that the said form was merely a consent extending the period of limita-

tion on assessment from June 30, 1951 to June 30, 1952.)

2. Plaintiff's federal tax returns for the years 1944 and 1945. (Plaintiff will contend that the said return for the year 1944 was signed by her without knowledge of any representation to be made therein relating to an interest in a partnership, and that what purports to be her signature on said return for the year 1945 is a forgery and that she had no knowledge of said return.)

3. Copy of Complaint in Chancery for Dissolution filed by plaintiff (formerly Claire Borin) in the Circuit Court of Cook County, Docket No. 46 C 1685. (Plaintiff will contend that any representations contained in said complaint relating to an interest in a partnership were made in erroneous reliance on contentions theretofore made by plaintiff in intervention. Plaintiff will also show that said complaint was dismissed and that she received nothing by virtue thereof.)

4. Copy of Answer to Nathan Borin (deceased husband of plaintiff) filed on or about June 10, 1946, to Complaint referred to in No. 3 above. (Plaintiff will contend that any such representations made in this exhibit were made for tax purposes.)

5. Copy of Amended and Supplemental Complaint for [15] Divorce filed by plaintiff (formerly Claire Borin) in the Superior Court of Cook County, Docket No. 45 S 5229. (Plaintiff will con-

tend that any representations contained in said complaint relating to an interest in a partnership were made in erroneous reliance on contentions theretofore made by plaintiff in intervention. Plaintiff will also show that she received nothing by virtue of said representations.)

6. Copy of Second Amended and Supplemental Complaint for Divorce in matter referred to in No. 5 above. (Plaintiff will contend that any representations contained in said complaint relating to an interest in a partnership were made in erroneous reliance on contentions theretofore made by plaintiff in intervention. Plaintiff will also show that she received nothing by virtue of said representations.)

7. Copy of Complaint in Equity filed in the Superior Court of Cook County, Docket No. 49 S 2195, by plaintiff (formerly Claire Borin). (Plaintiff will contend that any representations contained in said complaint relating to an interest in a partnership were made in erroneous reliance on contentions theretofore made by plaintiff in intervention. Plaintiff will also show that she received nothing by virtue of said representations.)

8. Form 899—"Certificate of Assessments and Payments".

9. Form 668—"Notice of Federal Tax Lien Under Internal Revenue Laws" filed as document No. 2579, November 7, 1956, in Los Angeles County Recorder's Office.

10. Copy of an agreement dated April 15, 1943 involving shares in said Borin Art Products Corporation, together with copies of all of the checks executed, delivered, or endorsed under said agreement.

B. By plaintiff and defendant in intervention:

1. Exemplified copy of an executed copy of a document [16] entitled "Agreement", dated May 1, 1943, and relating to the formation of the said entity, Borin Art Products Company. (The purpose of this exhibit is to show that what purports to be the signature of plaintiff on said document is a forgery.)

2. If item 10 under exhibits to be offered by defendant and plaintiff in intervention is not offered by them, plaintiff may ask that it be introduced as an exhibit of plaintiff.

VIII.

The following issues of law, and no others, remain to be litigated upon the trial:

1. Whether collection of said taxes by distraint is now barred by the statute of limitations. (Plaintiff will contend that this issue in itself disposes of the injunction action in favor of plaintiff and reduces this proceeding to the action in intervention.)

2. Whether plaintiff is liable for said taxes as a transferee pursuant to section 311 of I.R.C. 1939.

IX.

The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

Sept. 23, 1957.

/s/ HARRY C. WESTOVER,
United States District Judge.

Approved As to Form and Content:

/s/ GEORGE T. ALTMAN,

Attorneys for Plaintiff and Defendant in Intervention.

/s/ JOHN G. MESSER,
Attorney for Defendant and Plaintiff in Intervention. [17]

[Endorsed]: Filed September 23, 1957.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated, by and between the parties hereto, as follows:

1. The period for collection of the taxes involved here by levy or distraint expired on June 15, 1957, and collection thereof, other than by the proceeding in intervention filed herein, is now barred by the statute of limitations.

2. Because of the facts stated in the foregoing paragraph, the injunction action herein is now moot and this proceeding is reduced to the action in intervention. [18]

3. Plaintiff herein, being defendant in intervention, will present no evidence intended to show that her signature on a waiver of restrictions on assessment was obtained by fraud of an agent of the government.

Dated: November 26, 1957.

LAUGHLIN E. WATERS,

U. S. Attorney,

EDWARD R. McHALE,

Asst. U. S. Attorney,

Chief, Tax Division,

JOHN G. MESSER,

Asst. U. S. Attorney,

/s/ JOHN G. MESSER,

Attorneys for Defendant and Plaintiff in Intervention.

/s/ GEORGE T. ALTMAN,

Attorneys for Plaintiff and Defendant in Intervention.

It Is So Ordered this 27th day of November, 1957.

/s/ HARRY C. WESTOVER,

Judge. [19]

[Endorsed]: Filed November 27, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION IN
RESPECT OF CERTAIN EXHIBITS

To the Defendant, Robert A. Riddell, the United States, Plaintiff In Intervention, and Their Attorneys:

You Will Please Take Notice that plaintiff will call for hearing her motion, stated below, to reopen the record for the purpose of making motions in respect to defendant's exhibit U and plaintiff's exhibit 1, before the Honorable Harry C. Westover, United States District Judge, in Courtroom No. 5, United States Post Office and Courthouse Building, 312 North Spring Street, Los [20] Angeles 12, California, at 10:00 a.m., Monday, February 3, 1958, or as soon thereafter as counsel may be heard.

I.

Plaintiff moves the court to reopen the record, upon such terms as the court may prescribe, for the purpose of enabling her to make the following motions in respect to the exhibits indicated:

A.

Plaintiff moves the court to vacate the admission in evidence of a certain abstract of record, being defendant's exhibit U, and to allow objections thereto.

Plaintiff's counsel came away with the definite belief that he had made this motion during the course of trial and that it had been denied. The offi-

cial report, however, does not show such a motion and it may well be that plaintiff's counsel through inadvertence omitted to make it. It was his intention to make it at the point indicated by page 151, line 14, of the official transcript, and it was his purpose to make it on the ground stated at page 150, lines 4 to 10.

That exhibit is not one of those listed in the pre-trial conference order. While the court, at page 150, lines 19 to 23, indicated that it would treat that exhibit as irrelevant in any case, the court's finding, at page 182, lines 18-23, that Mrs. Borin owned 80 shares of stock of Borin Art Products Corporation may have been based upon that exhibit, in view of the direct testimony to the contrary on page 26, lines 8 to 10.

Also, the reason given by the court in indicating that the defendant's exhibit U was irrelevant, that is, that it involved divorce proceedings (page 150, lines 19 to 23), and therefore had nothing to do with the case, is the same reason for which the court denied admission into evidence of plaintiff's exhibit 12 for identification, which was offered immediately afterward and related [21] to the same proceeding as defendant's exhibit U. (See page 152, line 20, to page 153, line 7.)

B.

Plaintiff further moves the court for leave to state for the record the limited purpose for which she offered exhibit 1, being a copy of a certain agreement.

That plaintiff's exhibit 1 was intended to be filed for a limited purpose is specifically shown in the pre-trial conference order, page 7, lines 3-5. Plaintiff offered that document only for the purpose of showing the deliberate falsification of her signature thereon, and also the terms of the purported agreement, but not for the purpose of establishing the truth of any of the recitals contained therein. It was, of course, not plaintiff's purpose to contradict her own direct testimony (page 26, lines 8 to 10) that she never owned any stock in Borin Art Products Corporation.

II.

In accordance with the permission granted by the court plaintiff will file before the date for hearing this motion her proposed findings and points and authorities, as allowed by the court, page 190, lines 22 to 25, of the transcript.

Respectfully submitted,

/s/ GEORGE T. ALTMAN,
Attorney for Plaintiff. [22]

Affidavit of George T. Altman

County of Los Angeles,
State of California—ss.

George T. Altman, being duly sworn, deposes and says:

That the facts stated in paragraphs A and B of the foregoing Motion in Respect of Certain Exhibits are true and correct.

/s/ GEORGE T. ALTMAN.

Subscribed and sworn to before me this 23rd day of January, 1958.

[Seal] /s/ DOROTHY B. CLOVER,
Notary Public in and for said
County and State. [23]

Memorandum of Points and Authorities in Support
of Motion in Respect of Certain Exhibits.

Under F.R.C.P., Rule 60(b)(1), the corrections requested here may be made even after judgment. This is all the more true here since this is a proceeding in equity under the trust fund doctrine, *Phillips v. Commissioner*, 283 U.S. 589, *Phillips-Jones Corporation, et al., v. Parmely*, 302 U.S. 233, and defendant here has admitted that this is a harsh case (T. 100, lines 1 and 2). See also F.R.C.P., Rule 59; *Partridge v. Presley*, 88 App. D.C. 298, 189 F. 2d 645, cert. denied 342 U.S. 850.

The ground for objection to admission of defendant's exhibit U as stated in the transcript (page 150, lines 4 to 10) is clearly within the hearsay rule. See 1 *Jones on Evidence*, sec. 297, page 559, and sec. 298, page 563. [24]

Acknowledgment of Receipt of Copy Attached. [25]

[Endorsed]: Filed January 24, 1958.

[Title of District Court and Cause.]

FINDINGS PROPOSED BY PLAINTIFF,
DEFENDENT IN INTERVENTION

1. This is an action by plaintiff for an order enjoining defendant from collecting taxes and interest assessed against plaintiff as alleged transferee of the assets of Borin Art Products Corporation, an Illinois corporation, and an action by plaintiff in intervention for recovery of said taxes. [Pre-trial conference order, par. III(1)].

2. The period for collection of taxes involved here by levy or distraint expired on June 15, 1957, and collection thereof other than by the proceeding in intervention is now barred by the [26] statute of limitations [Stipulation, par. 1].

3. Because of the facts stated in the foregoing paragraph, the injunction action herein is now moot and this proceeding is reduced to the action in intervention. [Stipulation, par. 2].

4. Plaintiff is an individual residing at Los Angeles, California. [Pre-trial conference order, par. III(2)]. She was married to Nathan Borin in 1933 [T. 25, lines 18-20] and divorced from him in 1949. [T. 33, lines 3-6].

5. Defendant is District Director of Internal Revenue for the Sixth District of California. [Pre-trial conference order, par. III(3)].

6. The taxes involved are income and excess profits taxes of the said Borin Art Products Corpo-

ration for the year 1942 and the period January 1 to April 30, 1943. [Pre-trial conference order, par. III(4)].

7. The total amount of such taxes asserted against the said corporation for the said periods is not shown by evidence in the record; of said amount, whatever it is, the sum of \$10,705.69 was thereafter assessed against plaintiff on the ground that assets in that amount were received by plaintiff from the said corporation as transferee. [Pre-trial conference order, pars. III(4), (10)].

8. On April 30, 1943, the said corporation was terminated and liquidated and the assets of the corporation, subject to its liabilities, were transferred to a purported partnership known as Borin Art Products Company. [Pre-trial conference order, par. III(5); T. 182, line 24 to T. 183, line 2].

9. Prior to said transfer of assets the shareholders of the corporation transferred their stock therein to the said Borin Art Products Company and at the time of said transfer of assets the Borin Art Products Company was the sole shareholder of the corporation. [Pre-trial conference order, par. III(7)]. [27]

10. Under the purported organizing instrument of said Borin Art Products Company, entitled "Agreement," hereinafter referred to as the "partnership agreement," Nathan Borin was named as sole general partner and sixteen other individuals, including plaintiff, as limited partners. [Plaintiff's

exhibit 1, pp. 3-4]. The amount contributed by plaintiff was therein shown as "10% of company [Borin Art Products Corporation] assets of the agreed value of \$12,000." [Plaintiff's exhibit 1, pp. 4 and 5]. The corresponding "agreed" value of the total assets of said corporation on liquidation was 10 times that amount or \$120,000.00.

11. Subsequent to the dissolution of said corporation and the distribution of its assets, additional liabilities were found and determined as follows: income and excess profits taxes determined June 3, 1948, for the years 1940 and 1941 in a total amount of \$80,019.10 [Plaintiff's exhibit 2]; income and excess profits taxes for the year 1942 and the period January 1 to April 30, 1943, in an amount in excess of \$40,000.00. [The complaint in intervention, par. V, alleges that a total of \$108,287.99 was assessed against the corporation for the periods 1942 and January 1 to April 30, 1943. While there was no proof offered by the government on this, we assume that the amount in any event was in excess of \$40,000.00].

12. Assuming the "agreed" value shown in par. 10 above is the actual value, the net value of the corporation's assets as of the date of liquidation and distribution and after deduction of all liabilities including federal taxes was less than zero. [Based on paragraphs 10 and 11 above].

13. If plaintiff in fact received on the distribution of said corporation's assets a 10% interest in said Borin Art Products Company, said interest

was received by her subject to a lien for any debts due Nathan Borin, including the "purchase" price of the purported like interest in the corporation surrendered. [Plaintiff's [28] exhibit 1, par. 20]. Also, such interest in Borin Art Products Company was terminable by Nathan Borin at will. [Plaintiff's exhibit 1, pars. 5, 21].

14. The value of such interest, if any, received by her was less than zero. [Pars. 12 and 13 above].

15. No contrary evidence of the value of such interest, if any, was introduced by defendant. [T. 96; on the question of burden of proof see pars. A and K of Argument filed concurrently herewith].

16. No evidence was introduced to show whether or not the sums assessed against plaintiff as transferee for the periods involved here were not also assessed against others. Nor was any evidence introduced to show what the corporate taxes involved amounted to, or whether or not any part of such taxes was in fact unpaid. [For the importance of this paragraph see par. B of Argument filed concurrently herewith].

17. The United States had previously assessed against plaintiff, as alleged transferee of the said corporation, income and excess profits taxes for the years 1940 and 1941 in the total amount of \$12,000.00. The said amount was subsequently paid in full by persons other than plaintiff. [Pre-trial conference order, par. III(11); plaintiff's exhibit 3; see also par. C of Argument filed concurrently herewith].

18. Under the partnership agreement of said Borin Art Products Company it was provided, inter alia, as follows:

“(5) The term for which the partnership is to exist is the period of one year commencing the 1st day of May 1943 and ending April 30, 1944, and thereafter from year to year unless at least six (6) calendar months before April 30th of any year, General Partner [Nathan Borin] shall have delivered to the office of the partnership a written notice that he desires to terminate the partnership [29] at the close of business on April 30th of the succeeding year, in which event the partnership shall terminate at the time so designated.” [Plaintiff’s exhibit 1, p. 4, par. 5].

“(8) The time when the contribution of the Limited Partners who have made contribution is to be returned, is at the termination of said partnership. [Plaintiff’s exhibit 1, pp. 6-7, par. 8].

“(20) It is further understood and agreed that in any instance where any Limited Partner has become indebted to the General Partner by reason of the purchase of stock of Borin Art Products Corporation, or for any other reason, the said General Partner shall have a lien upon any and all profits payable to the said Limited Partner from said partnership until the sum due said General Partner from said Limited Partner or partners has been paid him.” [Plaintiff’s exhibit 1, pp. 9-10, par. 20].

“(21) In the event that employment by the part-

nership of any of the Limited Partners is terminated for any reason, with or without cause, the partnership shall thereafter have a continuing option and right to re-purchase said Limited Partner's interest in said partnership. In the event said partnership elects to re-purchase the interest of such Limited Partner at any time thereafter, it shall pay therefor the book value thereof as determined by the last previous audit prior to such election. The payment therefor shall be in equal installments extending over a period of eighteen (18) months from the time of such election." [Plaintiff's exhibit 1, p. 10, par. 21].

19. Plaintiff in fact never was an employee of said partnership and never rendered any services to said partnership. [30] [T. 167, lines 14-16].

20. Plaintiff never owned any stock in the Borin Art Products Corporation. [T. 26, lines 8-10; as to defendant's exhibits see pars. D through J of Argument filed concurrently herewith]. She never attended a meeting of the Board of Directors or a meeting of the stockholders, nor received any dividends from the corporation. [T. 26, lines 11-20]. She did not know that the corporation was liquidated, nor did she know that the partnership was formed. [T. 26, line 21, to T. 27, line 4].

21. Plaintiff did not sign the partnership agreement. [T. 183, lines 3-4]. What purports to be her signature on the partnership agreement was an attempt by someone else to copy her signature. [T. 10, line 19 to T. 11, line 1]. Plaintiff never

authorized anyone to sign the partnership agreement for her. [T. 118, lines 18 to 21].

22. Plaintiff has had no business experience and does not know anything about business practices. [T. 120, lines 2 to 4 and lines 10 and 11].

23. Nathan Borin treated the partnership as his own business. [T. 142, lines 22 to 25; see also par. L of Argument filed concurrently herewith]. The partnership was a dummy setup and it was Nathan Borin's purpose in doing this to evade taxes. [T. 160, lines 8 to 10]. By letter dated March 30, 1950, the Treasury Department advised plaintiff of an overassessment determined for the years 1944, 1945 and 1946 in the individual income taxes of plaintiff and as a reason therefor stated that the income taxed to plaintiff as income from a partnership Borin Art Products Company was not her income but that of her husband Nathan Borin. [Pre-trial conference order, par. III(12)]. None of the persons shown in the partnership agreement as limited partners received any actual distributions from the partnership. [T. 98, lines 9-10]. Nathan Borin charged vast sums of money which he expended in night [31] clubs, cabarets and other places of entertainment as partnership expenses, when, in fact, they were not; he charged numerous items involving hotel bills for his own personal pleasure to the partnership as expenses; he charged the purchase and operation of two Cadillac automobiles to the partnership as firm expenses, when, in fact, they were for his individual use; he gave lav-

ish gifts costing substantial sums of money to various persons and charged the same as an expense of the partnership, when, in truth and in fact, the gifts were made solely for his individual benefit and in numerous other ways he utilized the funds of the partnership for his own individual benefit. [Defendant's exhibit T, p. 4].

24. In February, 1945, plaintiff went to Florida and, because of intervening circumstances, she returned about a month later to file suit against her husband for divorce. [T. 28]. She found certain papers and documents in their home and took them to her attorney. Her attorney said that the papers indicated that she had some interest in her husband's business. Prior thereto she never knew anything about such an interest. [T. 29, lines 17 to 24]. Plaintiff herself never informed any of the attorneys whom she employed that she had an interest in the partnership. [T. 119, lines 14 to 16; T. 139, lines 17 to 20].

25. Plaintiff signed her personal income tax return for 1944 in blank; she did this at the request of a Mr. Locker, who at that time worked for Mr. Borin; when she signed it none of the writing was on the return; she returned the return either to Mr. Locker or Mr. Borin, and after she returned it with her signature the amounts shown in the return were inserted by parties unknown to her. [T. 45, line 16 to T. 46, line 7; T. 183, lines 5 to 11]. At that time she was always getting papers to sign and signed them without knowing what they meant. [T. 58, lines 12-14].

26. Plaintiff did not sign the income tax return filed in her name for 1945. Her name upon that return was placed there [32] by someone else without her authorization. She had no knowledge that the return was filed or what was contained in it. [T. 183, lines 12 to 17].

27. Plaintiff did not receive any money, property, or assets from the Borin Art Products Corporation at the time of its dissolution or from the partnership, Borin Art Products Company. [T. 54, lines 15-17; T. 54, line 25 to T. 55, line 2; T. 183, lines 18 to 21]. There was no benefit received and accepted by her. [T. 189, lines 19-21].

28. Borin Art Products Company was not a real, bona fide partnership. [T. 160, lines 8 to 10; see also par. L of Argument filed concurrently herewith].

29. Plaintiff was not, during the taxable year 1944, or 1945, or at any other time, a bona fide limited partner in said firm but was merely so designated for tax purposes by her then husband, Nathan Borin. [Defendant's exhibits W, X, and Y; see also pars. 23 and 28 above].

30. The equities here are in favor of plaintiff. [T. 190, line 21; see also par. J of Argument filed concurrently herewith]. [33]

Acknowledgment of Receipt of Copy Attached. [34]

[Endorsed]: Lodged January 30, 1958.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO "FINDINGS
OF FACT, CONCLUSIONS OF LAW AND
JUDGMENT" LODGED BY DEFENDANT

In order to avoid confusion, we have in the following statement of objections adopted the government's nomenclature referring to Mrs. Morse as the defendant and the government as the intervenor. Also, the paragraph numbers are the government's. The transcript reference "T" refers to the original transcript of testimony taken at the trial on January 2 and 3, 1958. References to the proceeding had on February 3, 1958, are separately identified.

I.

No objection. [35]

II.

No objection.

III.

No objection provided two corrections are made. After the words "filed November 27, 1957," there should be inserted: "the statute having run on collection of said taxes by levy or distraint,". This is necessary to show the reason the suit for injunction became moot and the effect of its becoming moot.

A second correction is that there should be added to this paragraph the following sentence: "She was married to Nathan Borin in 1933 and divorced from him in 1949." The year of marriage is shown in the transcript at page 25, lines 18-20, and the year of divorce is shown at page 33, lines 3-6.

IV.

No objection.

V.

No objection.

VI.

There is no objection provided two corrections are made. As the first, there should be inserted after the word "corporation" in line 10 the following: " , subject to all of its liabilities, ". This is shown in the pre-trial conference order, page 3, lines 9-11.

The second correction is that the word "partnership" should be changed to read "purported partnership." We submit that a bona fide partnership did not exist. See the transcript, page 160, lines 8-10; see also par. 23 of "Findings Proposed by Plaintiff, Defendant in Intervention" and par. L of "Plaintiff's Argument on the Evidence and the Law," filed January 30, 1958.

VII.

This paragraph is wholly objected to. There is no evidence to support the conclusion that Claire Morse was the owner of 80 shares of stock of Borin Art Products Corporation. Mrs. [36] Morse testified directly, in reply to the court's question, that she never owned any stock in the corporation. [T. 26, lines 8-10]. Correspondingly, she never attended a meeting of the Board of Directors or a meeting of the stockholders, or received any dividends from the corporation. [T. 26, lines 11-20]. She did not even know that the corporation was liquidated, nor did she know that the partnership was formed. [T. 26, line 21, to T. 27, line 4]. The gov-

ernment has itself stated that stock may have been transferred into her name without her knowledge "as part of the scheme for dissolution of the corporation and creating the partnership." [Transcript of proceedings February 3, 1958, p. 2, lines 8-14]. This in itself proves that she never in fact owned any stock in the corporation. Precisely such mechanics were used in forming the partnership involved in *Commissioner v. Tower*, 327 U.S. 280, which case was explained and approved in *Commissioner v. Culbertson*, 337 U.S. 733.

VIII.

We make several objections to this paragraph. In the first place we submit for reasons stated above that the term "partnership" should read "purported partnership." In the second place, Mrs. Morse did not "receive" a 10% interest in the partnership. An accurate statement of the interest which was evenly purportedly created in her by the partnership agreement requires pars. 10 through 15 and par. 18 of "Findings Proposed by Plaintiff, Defendant in Intervention," filed January 30, 1958.

Assuming that Mrs. Morse did have such an interest it is clear also that she never agreed to a value of \$12,000.00 and of course there is no agreement between the parties to this proceeding, nor any evidence of any kind, that the interest, if it did exist, had any such value, or any value at all.

IX.

The word "directly" in line 24 should be stricken and also the entire portion beginning in line 25

with the word "but." [37] As noted above in reference to par. VII, the government itself has now indicated in this proceeding that the purported receipt of 80 shares and exchange of such shares for an interest in the partnership were mere forms carried out without Mrs. Morse's knowledge as part of a "scheme," also unknown to her, whereby the corporation was dissolved and the so-called partnership formed.

X.

No objection.

XI.

We submit that this paragraph should be entirely stricken. In the first place, these "agreements" are not real agreements. The recited consideration from the Commissioner, not to issue a deficiency notice to and assess the corporation, is illusory since the corporation had no assets; and the recited admission by the taxpayer, that she is a transferee, is meaningless since it is expressly limited to the extent of her liability as transferee, the very liability here in question. Furthermore, contrary to the final sentence of this paragraph, the Commissioner neither accepted nor relied on these "agreements," for, as shown in intervenor's par. V, he did in fact assess the corporation. We submit therefore that this paragraph of the findings lodged by intervenor should be stricken.

XII.

We object to this paragraph for the reason that there is a failure to disclose the entire wording of the exhibit. The exhibit reads at the top:

“Pursuant to the provisions of Section 272(d) of the Internal Revenue Code and/or the corresponding provisions of prior internal revenue laws, the restrictions provided in Section 272(a) of the Internal Revenue Code and/or the corresponding provisions of prior internal revenue laws as amended are hereby waived and consent is given to the assessment and collection of the following deficiency [38] or deficiencies in tax:”.

It is clear from the sections referred to that the document is nothing but a waiver of the right to test the validity of the tax in the Tax Court before payment. This is more clearly shown by the first paragraph of the note at the bottom of the exhibit reading as follows:

“The execution and filing of this waiver at the address shown in the accompanying letter will expedite the adjustment of your tax liability as indicated above. It is not, however, a final closing agreement under section 3760 of the Internal Revenue Code, and does not, therefore, preclude the assertion of a further deficiency in the manner provided by law should it subsequently be determined that additional tax is due, nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.”

We, of course, have no objection to a paragraph quoting the exhibit verbatim even though, as shown at T. 179, lines 9-13, defendant, Mrs. Morse, was not

allowed to introduce a copy of a letter showing that the document was misrepresented to her as a mere extension of time.

XIII.

We object to the last sentence of this paragraph, that is, the sentence which reads "No part of any of said unpaid balances has been paid." We agree that no part of it was paid by Mrs. Morse. We agree also that no payment was made against this particular transferee assessment. There is no evidence, however, that the deficiencies in taxes of the corporation, upon the basis of which the transferee assessment was made, have not in fact been paid in full.

XIV.

No objection. [39]

XV.

No objection.

XVI.

We object to the entire portion beginning in line 23 with the words "but subsequent." We submit that there is no evidence to support that portion. There is, indeed, no evidence that she had ever read the partnership agreement or knew its contents.

If reliance is placed upon exhibit T we submit that the entire document and not just a part of it should have been brought into the record.

Moreover, the document on its face shows that the purported partnership was a sham. See the following wording in that document on page 4:

"Nathan Borin charged vast sums of money

which he expended in night clubs, cabarets and other places of entertainment as partnership expenses, when, in fact, they were not; he charged numerous items involving hotel bills for his own personal pleasure to the partnership as expenses; he charged the purchase and operation of two Cadillac automobiles to the partnership as firm expenses, when, in fact, they were for his individual use; he gave lavish gifts costing substantial sums of money to various persons and charged the same as an expense of the partnership, when, in truth and in fact, the gifts were made solely for his individual benefit and in numerous other ways he utilized the funds of the partnership for his own individual benefit." (Emphasis added.)

That under such circumstances a partnership is a sham, see par. L of "Plaintiff's Argument on the Evidence and the Law," filed January 30, 1958.

Furthermore, neither exhibit T nor anything else in the record shows that Mrs. Morse "recognized and ratified the partnership [40] agreement," as set forth in intervenor's proposed finding XVI. Ratification cannot be asserted against a person unless it is shown that he had foreknowledge of all the material facts, and there is no such showing here.

"A ratification can only arise from act of the mind, the intent of the party to ratify, knowing all the facts and circumstances connected with the transaction." *Stevenson v. Dowie*, 3 Ill. C.C. 135, 200; 8 Ill. Digest 128. "A principal is not bound by a ratification of an unauthorized act of his agent

unless he had previous knowledge of all the material facts." *Hildebrand v. Beck*, (1925) 196 Cal. 141, 148.

To the same effect, *Tidewater Oil Company v. Commissioner*, 29 B.T.A. 1208, 1221; *Bigelow on Estoppel*, 6th Edition, 1913, at p. 493; *Schutz v. Jordan*, 141 U.S. 231, 35 L. Ed. 705, 11 S. Ct. 906.

Moreover, ratification, even as so defined, is not sufficient here. What must be shown is estoppel. In *Tidewater Oil Company v. Commissioner*, *supra*, it was stated, at pp. 1221-1222:

"The respondent [the Commissioner] has not established as a fact in this case a ratification, an acquiescence, an affirmance, or an acceptance of benefits by the petitioner, but, even if he had, the mere fact would be inadequate for his purpose without, in addition, an estoppel otherwise incomplete."

The *Tidewater Oil* case has been cited with approval more than 30 times, including many times on the very point here involved, such as in *Pancoast Hotel Company v. Commissioner*, 2 T.C. 362, 370, and most recently in *Crosley Corporation v. U.S.* (C.A. 6, 1956) 229 F. 2d 372.

This rule of the *Tidewater Oil* case is all the more pertinent here since the document allegedly ratified here was a forged document, insofar as Mrs. Morse was concerned. [41]

"At all events a principal may be liable on the forged instrument if his promise to assume the con-

tract induces the other party to change his position to his prejudice; the rule in such cases rests, however, on the doctrine of estoppel rather than that of ratification." 2 C.J.S. 1076, citing cases from numerous jurisdictions.

This is still more true here because the act of ratification relied on is a pleading. A pleading itself, even though under oath, cannot ratify, much less operate as an estoppel. It was stated in *Parkinson v. California Co.* (C.A. 10, 1956), 233 F. 2d 432, at 438:

"Be that as it may, we must reject the theory that the pleading of a claim under oath, apart from equitable considerations which may be deemed in reason to operate as an estoppel by conduct, irrevocably freezes the contentions of the pleader so that under no circumstances may he alter his view in that, or another, case, or assert an inconsistent position. This would not be in keeping with the spirit of Federal Rules of Civil Procedure, rule 8(e)(2), 28 U.S.C.A. would be out of harmony with the great weight of authority independent of that rule, and would discourage the determination of cases on the basis of the true facts as they might be established ultimately. Even in the case of false statements in pleadings, public policy can be vindicated otherwise—and more practicably and fairly in most instances—than through suppression of truth in the future. *Tracy Loan & Trust Co. v. Openshaw Inv. Co.*, 102 Utah 509, 132 F. 2d 388. The prevailing rule, more in accord with reason, is stated under

the principal section heading, 31 C.J.S. Estoppel, Sec. 121 p. 386, preceding the minority view quoted by the defendants. See also *Sinclair Refining Co. [42] v. Jenkins Petroleum Process Co.*, 1 Cir., 1938, 99 F. 2d 9, certiorari denied 305 U.S. 659, 59 S. Ct. 362, 83 L. Ed. 427."

To the same effect under Illinois Law, 18 Ill. Law and Practice 64, citing *Sholl v. German Coal Co.*, 28 N.E. 748, 139 Ill. 21; *Thomas V. Danglus*, 105 N.E. 2d 129, 346 Ill. App. 277; *Siegel, Cooper & Co. v. Colby*, 52 N.E. 917, 176 Ill. 210.

What must be shown then is estoppel, not ratification. As to what estoppel requires we refer to and incorporate by reference the legal contentions contained in "Plaintiff's Argument on the Evidence and the Law," filed January 30, 1958, paragraph J. Clearly there is no estoppel here. There were no benefits accepted by Mrs. Morse, nor any reliance by intervener to its detriment. The evidence is to the very contrary. On March 30, 1950, the government itself determined that Mrs. Morse had no partnership interest in Borin Art Products Company. [Pre-trial conference order, p. 3, line 31 to p. 4, line 7].

XVII.

We object to this paragraph. In the first place, if this complaint was indeed filed in a proceeding in Illinois then exhibit T represents on its face only a part of the document filed. There were attached to the document certain exhibits which were not introduced here.

It is clear here also that Mrs. Morse never received anything from any of the claims alleged in that document. This paragraph of intervener's proposed findings refers in the last sentence thereof to allegations of an interest in certain claims and causes of action against certain insurance companies. The record clearly shows that Mrs. Morse never received any part of any amounts paid by those insurance companies or any part of any other money, property, or rights of the purported partnership, Borin Art Products Company. [43]

Also we submit that this paragraph XVII is immaterial and irrelevant for the reason that under the law of Illinois a complaint is intended merely to frame the issues and does not bind the pleader. See paragraph E of "Plaintiff's Argument on the Evidence and the Law," filed January 30, 1958; also the argument above under par. XVI. Also, the quotation in this paragraph XVII does not disclose the statements on page 4 of the document quoted which on their face show that the purported partnership was nothing but a sham. We refer to the part quoted herein under par. XVI above.

XVIII.

The second sentence of this paragraph should be revised to read: "The amounts thereon were thereafter inserted by parties unknown to defendant or this court." The witness, in reference to the 1944 return, stated at p. 104 of the transcript, lines 1-3, inclusive, that she never knew anything about it.

We object also to the words "the defendant's dis-

tributable share" in the third sentence of this paragraph. We submit again that bona fide she was not a partner and therefore had no distributable share. The words "the defendant's distributable share" should be changed to read "a share."

XIX.

No objection.

XX.

We object to the part beginning on page 8, line 2, with the words "nor did she" and ending with the words "of the partnership." It incorrectly assumes that she was a partner and had a distributable share.

XXI.

We object to this paragraph for the same reason that we objected to par. VIII. In addition it is clear that liability of a transferee is limited to the actual value of the assets received by him from the transferor. *Phillips v. Commissioner*, 283 U.S. 589; [44] *Phillips-Jones Corporation, et al. v. Parmely*, 302 U.S. 233. The value which was agreed upon by those who actually signed the partnership agreement, and without defendant's knowledge, is certainly no criterion of the actual value of the interest. Besides, the so-called agreed value was the value of 10% of the corporation's assets and not necessarily the value of the purported limited partnership interest indicated in the partnership agreement under the name of Claire Borin.

XXII.

This paragraph is not accurate. Prior to the time

defendant filed suit for divorce, that is, March 1945, she signed papers at the request of her husband, Mr. Borin, or persons working for him. [T. 46, lines 1-4].

XXIII.

We object to this paragraph. F.R.C.P., Rule 52(a) expressly requires that "the court shall find the facts specially and state separately its conclusions of law thereon." We have not waived that requirement.

Conclusions of Law

I.

No objection.

II.

We of course object to this paragraph. The evidence is clear that defendant received nothing and therefore cannot be liable. Even if it were assumed that she received a paper interest of some kind the value thereof was nil. See pars. 8 through 15 of "Findings Proposed by Plaintiff, Defendant in Intervention," lodged January 30, 1958. In the third place, the partnership was the transferee, and defendant, even if she was a partner, had no right in fact to claim anything from the partnership. See pars. K and M of "Plaintiff's Argument on the Evidence and the Law," filed [45] January 30, 1958.

III.

We object to this paragraph. See statement above in respect to paragraph XVI of the findings.

IV.

We object to this paragraph for the same reason

that we objected to pars. VIII and XXI of the findings.

V.

We of course object to this conclusion as wholly unsustained by the record.

VI.

We do not agree with this paragraph. However, we make no objection to it since it is not contradicted by the admitted evidence.

VII.

We object to this for the same reason that we objected to par. XXIII of the findings.

Judgment

1. Paragraph (1) is erroneous. All that may be said there is that the suit for injunction became moot for the reason that the statute had run against defendant Robert A. Riddell in respect to collection by levy or distraint. The complaint for injunction may be dismissed, but only as moot for the reason given.

2. We submit, of course, that par. (2) is not sustained by the record.

3. We object to par. (3) for the same reason.

/s/ GEORGE T. ALTMAN,
Attorney for plaintiff and defendant in interven-
tion. [46]

Acknowledgment of Receipt of Copy At-
tached. [47]

[Endorsed]: Filed February 13, 1958.

United States District Court, Southern District
of California, Central Division

No. 20638-HW Civil

CLAIRE B. MORSE, Plaintiff,

vs.

ROBERT A. RIDDELL, District Director of
Internal Revenue, Defendant.

UNITED STATES OF AMERICA,
Plaintiff in Intervention,

vs.

CLAIRE B. MORSE,
Defendant in Intervention.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND JUDGMENT

This cause came for trial on January 2, 1958, before the Honorable Harry C. Westover, Judge, presiding, without the intervention of a jury. Plaintiff and defendant in intervention was represented by her counsel, George T. Altman, and defendant, Robert A. Riddell, and plaintiff in intervention, United States of America, were represented by their counsel, Laughlin E. Waters, United States Attorney, Southern District of California; Edward R. McHale, Assistant United States Attorney, Chief, Tax Division; John G. Messer, Assistant United States Attorney; and Eugene Harpole, Spe-

cial Attorney, Internal Revenue Service. The Court having heard and considered all the evidence, stipulations of facts, [48] exhibits and memoranda of counsel, makes the following findings of fact and conclusions of law:

Findings of Fact

I.

The plaintiff, Claire B. Morse, is a citizen of the United States and a resident of the County of Los Angeles, State of California.

II.

This is an action by plaintiff, Claire B. Morse, for an order enjoining defendant from the collection of taxes and interest assessed against said plaintiff and defendant in intervention as transferee of the assets of Borin Art Products Corporation, an Illinois corporation. The plaintiff in intervention, United States of America, intervened in said action to recover said taxes from said Claire B. Morse.

III.

By stipulation of the parties, filed November 27, 1957, the suit for injunction became moot prior to trial so that this proceeding was reduced to a trial of the issues raised by the complaint in intervention and the answer thereto. Plaintiff and defendant in intervention, Claire B. Morse, will hereinafter be referred to as defendant, and plaintiff in intervention, United States of America, will hereinafter be referred to as intervener. Said defendant has also been known as Claire Borin, Claire B. Borin, Claire Buchman, and Claire B. Buchman.

IV.

The complaint in intervention was authorized by the Commissioner of Internal Revenue, an authorized delegate of the Secretary of the Treasury, and was brought under the direction of the Attorney General of the United States.

V.

The Commissioner of Internal Revenue made an assessment [49] against Borin Art Products Corporation, an Illinois corporation, of declared value excess profits tax and excess profits tax, penalties and interest, for the calendar year 1942 and for the period January 1, 1943 through April 30, 1943, in the amount of \$110,334.07 and overassessment in income tax in the amount of \$2,046.98. No part of said assessment was paid by said corporation.

VI.

On April 30, 1943, said Borin Art Products Corporation was dissolved and on or about said date, all the assets of said corporation were transferred to a partnership, Borin Art Products Company.

VII.

Prior to the dissolution of said corporation, defendant was owner of eighty (80) shares of stock of said Borin Art Products Corporation.

VIII.

Under partnership agreement dated May 1, 1943 (Exhibit 1), which created the partnership of Borin Art Products Company, defendant Claire B. Morse,

as one of the limited partners named therein, received a ten per cent (10%) interest in said partnership of an agreed value of \$12,000.00 as set forth in said agreement.

IX.

Upon the dissolution of the Borin Art Products Corporation, defendant did not receive directly any of the money, property or assets of said corporation, but received for her interest of eighty (80) shares in said corporation the ten per cent (10%) interest in the partnership, Borin Art Products Company, as hereinabove set forth.

X.

On various dates, timely within the periods of limitation, as extended, defendant executed consents fixing period of limitation upon assessment of liability at law or in equity for income and [50] profits tax against a transferee for the assessments hereinabove set forth against Borin Art Products Corporation, transferor, for the calendar year 1942 and the period January 1, 1943 through April 30, 1943. The last of said consents (Form 977, Exhibit O), dated December 4, 1947, extended said period of limitation to June 30, 1951.

XI.

On or about February 8, 1946, defendant executed a transferee agreement (Exhibit L) which was as follows:

“Transferee Agreement

Date February 8, 1946

In consideration of the Commissioner of Internal

Revenue not issuing a statutory notice of deficiency to and making an assessment against Borin Art Products Corporation, incorporated under the laws of the State of Illinois on September 15, 1932, the undersigned, Claire Borin, admits that he (or she) is a transferee of the assets of said Borin Art Products Corporation and assumes and agrees to pay the amount of any and all Federal income, excess-profits, or profits taxes finally determined or adjudged as due and payable by the Borin Art Products Corporation for the taxable year ended December 31, 1942, to the extent of her liability as transferee under the Internal Revenue Code.

The undersigned further agrees (1) not to contest or deny in court or otherwise liability as transferee, (2) in the absence of the prior written consent of the Commissioner, not to sell, transfer, or assign [51] without adequate consideration all or any substantial portion of his (or her) assets, (3) upon request of the Commissioner, to execute consents in writing extending the period of limitation for assessment.

Claire B. Borin,
Transferee”.

On or about February 8, 1946, defendant executed another transferee agreement (Exhibit M), similar in all respects to the one set forth above, except that it covered the taxable period January 1, 1943 to April 30, 1943 of the Borin Art Products Corporation. Both agreements were delivered to the Government which accepted said agreements and relied thereon.

XII.

On or about March 19, 1951, defendant executed Form 874 (Exhibit Z)—“Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment”.

Said form contained the following amounts and statement:

Deficiencies:

| | |
|--------------------|--------------------------------|
| \$ 9,746.78 | for the year 1942. |
| 2,822.72 | for the period January 1, 1943 |
| ————— | to April 30, 1943 |
| <u>\$12,569.50</u> | |

Overassessment:

| | |
|--------------------|--------------------------------|
| \$ 1,490.02 | for the year 1942. |
| 373.79 | for the period January 1, 1943 |
| ————— | to April 30, 1943 |
| <u>\$ 1,863.81</u> | |

“Represents undersigned’s liability as a transferee of assets of Borin Art Products Corporation, Transferor, for income and excess profits taxes due from said Borin Art Products Corporation, [52] Transferor.”

XIII.

On June 15, 1951, the Commissioner of Internal Revenue assessed against defendant, as transferee of the assets of Borin Art Products Corporation, deficiencies in taxes of said corporation in amounts as follows:

Taxable Period: Year 1942. Amount Assessed: \$11,177.24. Date of Assessment: June 15, 1951.

Dates, Notice and Demands: June 25, 1951. Unpaid Balance: \$11,177.24. Taxable Period: Jan. 1, 1943 thru Apr. 30, 1943. Amount Assessed: \$3,588.89. Date of Assessment: June 15, 1951. Dates, Notice and Demands: June 26, 1951. Unpaid Balance: \$3,588.89.

No part of any of said unpaid balances has been paid.

XIV.

The Complaint in intervention was filed on May 31, 1957.

XV.

Upon dissolution of Borin Art Products Corporation, as hereinabove set forth, said corporation was, and is, without property or things of value.

XVI.

The partnership agreement hereinabove referred to was not personally signed by defendant, nor did she authorize anyone to sign it for her at the time of its execution, but subsequent to the execution of the partnership agreement, she recognized and ratified the partnership agreement, and became obligated thereunder, as fully as though she had personally placed her signature thereon at the time of its execution.

XVII.

On or about February 8, 1946, defendant signed and verified a complaint (Exhibit T) for dissolution of the partnership, Borin Art Products Company. Said complaint was entitled State of Illinois, County of Cook, In The Circuit Court of Cook

County In [53] Chancery, Case No. 46 C 1685, Claire Borin vs. Nathan Borin, et al., "Complaint in Chancery For Dissolution Of Partnership, Accounting, And Other Relief," and contained the following allegation:

"(2) That on or about the first day of May, 1943, the defendant, Borin and the plaintiff and certain other individuals, * * * entered into a certain limited partnership agreement; that said agreement was duly recorded in the office of the Recorder of Deeds of Cook County, Illinois, * * *."

In said complaint, Claire Borin alleged a ten per cent (10%) interest in the claims and causes of action of the partnership, Borin Art Products Company, against certain insurance companies.

XVIII.

Defendant signed Form 1040, U.S. Individual Income Tax Return (Exhibit 6), for the year 1944 in blank. The amounts thereon were inserted by parties unknown to this Court. Said return reported only one item of income which was the defendant's distributable share, in the amount of \$32,239.42, of the partnership income of Borin Art Products Company. Tax liability shown on said return was \$14,925.62, which was paid.

XIX.

Defendant did not sign the Form 1040, U. S. Individual Income Tax Return (Exhibit 7), filed for the year 1945. Her name was placed thereon by someone else without her knowledge. She did not have knowledge of its contents nor did she have

knowledge of its filing at that time. Said return reported only one item of income which was a distributable share, in the amount of \$46,028.35, of the partnership income of Borin Art Products Company. Tax liability shown on said return was \$26,596.39, which was paid.

XX.

During the period May 1, 1943 to termination of the said partnership, no part of the moneys, property or other assets [54] belonging to the partnership, Borin Art Products Company, was distributed to defendant, nor did she withdraw any part of her distributable share of income as a partner of said partnership.

XXI.

The liability of defendant, Claire B. Morse, as transferee of the assets of Borin Art Products Corporation, to the plaintiff, United States of America, is limited to \$12,000.00, the agreed value of said defendant's ten per cent (10%) interest in the partnership, Borin Art Products Company, as set forth in the partnership agreement dated May 1, 1943.

XXII.

At all times pertinent herein, defendant negotiated with the Internal Revenue Service through her attorneys or accountants concerning all matters pertaining to the transferee liability herein involved and followed their advice and recommendations in signing all documents, agreements, extensions, waivers, etc., pertaining to said liability.

XXIII.

All conclusions of law which are or are deemed to be findings of fact are hereby found as facts and incorporated herein as findings of fact.

Conclusions of Law

I.

This Court has jurisdiction of the subject matter and of the parties hereto.

II.

The defendant has not sustained her burden of proving that she is not liable, at law or in equity, as transferee of the assets of Borin Art Products Corporation, for deficiencies in taxes assessed against said Corporation.

III.

By her actions subsequent to May 1, 1943, the date of [55] execution of the partnership agreement which created the partnership of Borin Art Products Company, defendant recognized, ratified and adopted said partnership agreement and thereby became obligated thereunder as fully as though she had personally placed her signature thereon at the time of its execution.

IV.

The liability of defendant as transferee of the assets of Borin Art Products Corporation is limited to \$12,000.00, the agreed value of her interest in the partnership, Borin Art Products Company.

V.

The intervener, United States of America, is enti-

tled to judgment against defendant, Claire B. Morse, in the assessed amount of \$10,705.69, with interest thereon at six per cent (6%) per annum from May 1, 1943, but limited to a total not to exceed \$12,000.00.

VI.

The assessment against defendant as transferee was validly made within the period of limitations as extended in writing by said defendant.

VII.

All findings of fact which are deemed to be conclusions of law are hereby incorporated in these conclusions of law.

Judgment

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ordered, adjudged and decreed:

(1) That plaintiff, Claire B. Morse, take nothing by her suit for injunction against defendant, Robert A. Riddell, District Director of Internal Revenue, and that said complaint for injunction be, and it hereby is, dismissed with prejudice.

(2) That plaintiff in intervention, United States of America, do have and recover of and from the defendant in intervention, Claire B. Morse, under its Complaint in Intervention, the sum of \$12,000.00, plus interest as provided by law on said judgment. [56]

(3) That the defendant, Robert A. Riddell, and plaintiff, in intervention, United States of America,

have judgment for and shall recover from plaintiff, Claire B. Morse, the amount of their costs, to be taxed by the Clerk of this Court in the sum of \$26.00.

Dated: This 17th day of February, 1958.

/s/ HARRY C. WESTOVER,
United States District
Judge. [57]

Acknowledgment of Receipt of Copy Attached. [58]

[Endorsed]: Lodged February 5, 1958. Filed and Entered February 17, 1958.

[Title of District Court and Cause.]

ORDER DENYING MOTION IN RESPECT
OF CERTAIN EXHIBITS

This matter having come before the Court on motion of the plaintiff and defendant in intervention in respect of certain exhibits, based on the motion, pleadings and memoranda of counsel, and the Court having duly considered the same, it is

Ordered, that said motion in respect of certain exhibits be and is hereby denied.

Dated: February 19, 1958.

/s/ HARRY C. WESTOVER,
United States District
Judge. [59]

Presented by: Laughlin E. Waters, United States Attorney, Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, John G. Messer, Assistant United States Attorney, signed John G. Messer, Assistant United States Attorney. [60]

[Endorsed]: Filed February 19, 1958.

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION
FOR NEW TRIAL

To the Defendant, Robert A. Riddell, the United States, Plaintiff in Intervention, and Their Attorneys:

You Will Please Take Notice that defendant in intervention will call for hearing her motion, stated below, for a new trial before the Honorable Harry C. Westover, United States District Judge, in Courtroom No. 5, United States Post Office and Courthouse Building, 312 North Spring Street, Los Angeles, California, at 10 A.M., Monday, March 3, 1958, or as soon thereafter as counsel may be heard. [61]

Defendant in Intervention, Claire B. Morse, now moves the court, under F.R.C.P., Rule 59, for a new trial, and respectfully shows:

I.

There is attached hereto a photostatic copy of a page from a government document entitled "Memo-

randum of Conference" and covering a conference held in the revenue office at Chicago, Illinois, September 26, 1950. The original of said memorandum is contained in the government's administrative file in this proceeding.

In the course of the proceedings February 3, 1958, admission was made by the government (Tr. 2/3/58, p. 8, lines 8-14) that the 80 shares which it alleged were "owned" by defendant in intervention were merely issued in her name, without her knowledge, "prior to the dissolution of the corporation as part of the scheme for dissolution of the corporation and creating the partnership." As the attached exhibit shows, that admission was based on actual evidence in the government's possession. Not only does it negative any real and actual ownership of stock by defendant in intervention, it shows that the stock was charged to her at \$150 per share, or a total of \$12,000, so that under the terms of the purported partnership agreement, par. 20, the limited partnership interest entered therein under her name was subject to a lien in favor of Nathan Borin in the sum of \$12,000.

It follows also that when the court inquired of the government as to its evidence in respect to the issue of stock (Tr. 2/3/58, p. 9, lines 10-12) the government failed to inform the court of what evidence it actually had.

II.

Defendant in intervention was surprised when the court, after indicating (Tr. 1/3/58, p. 150, lines 22-23) that Exhibit U was immaterial and would

be disregarded, made a finding that she [62] owned 80 shares of stock in the Borin Art Products Corporation. If that finding was based on estoppel, defendant in intervention would be prepared to meet it strictly on the law. But the findings do not expressly indicate this, and except for said Exhibit U, or estoppel related to Exhibit 1, there is nothing whatever in the record to contradict the direct testimony of defendant in intervention that she owned no stock in the corporation.

III.

Because of the factors stated above, defendant in intervention submits that a new trial should be granted and additional testimony taken.

IV.

In the alternative, defendant in intervention moves the court to amend par. VII of its findings to read:

“Prior to the dissolution of said corporation, and as part of the scheme for dissolution of the corporation and creating the partnership, there was issued in the name of defendant without her knowledge eighty (80) shares of stock of said Borin Art Products Corporation, subject to a lien in favor of Nathan Borin in the sum of \$12,000.00.”

V.

Defendant in intervention also desires to point out that her contention, that if she had any transferee liability it was exhausted by payment by others of the sum of \$12,000 assessed against her in respect of the corporation's taxes for the years

1940 and 1941, was put in issue by the pre-trial conference order, p. 3, lines 27-31, and p. 7, lines 18-19; also by the Memorandum of Contentions of Fact and Law filed by defendant in intervention, p. 5, lines 14-17.

Respectfully submitted,

/s/ GEORGE T. ALTMAN,

Attorney for plaintiff and defendant in intervention. [63]

Borin Art Products Company

Issue No. 15:

Partial disregard of partnership.

Finding of Fact:

Borin Art Products Company is a limited partnership formed on May 1, 1943. Photostat copy of partnership agreement is attached to revenue agent's report as Bureau Enclosure H. The partnership was formed for the purpose of taking over the business formerly conducted by Borin Art Products Corporation (an Illinois corporation). The stockholders of record of the corporation became the partners in shares equivalent to their stockholdings in the corporation. Nathan Borin was designated the "general partner" and fifteen alleged stockholders were designated as "limited partners." Nathan Borin created a trust for three of his children, Mark Winston the trustee acquired a 15 per cent interest in the partnership. Copy of trust agreement is attached to revenue agent's report as Bureau Enclosure "A". A number of the limited

partners consists of members of Nathan Borin's family and relatives. Shortly before the partnership was formed Nathan Borin sold shares of capital stock of Borin Art Products Corporation to these individuals at \$150 per share to be paid from the proceeds of dividends declared by Borin Art Products Corporation or from profits of the limited partnership. See Bureau Enclosure "E" attached to and made a part of the revenue agent's report.

The examining officer concluded that a number of the limited partners did not qualify as bona fide partners and accordingly he proposes to make substantial adjustments to distribution of partnership earnings for each of the years under review. The examining officer's contentions are set forth on pages 2 to 6 of letter of transmittal of his report. See also Schedules 2, 3, 3-A, 5, 6, 6-A, 8, 9, 9-A, 11, 12 and 12-A of the revenue agent's report.

The limited partners disregarded in the revenue agent's report are as follows:

| | Period 5/1/43 to 1/31/44 | 1945 | F.Y.E. 1/31 1946 | 1947 | Relation to Nathan Borin |
|--|-----------------------------|--------|---------------------|--------|-----------------------------|
| lail Borin | 10% | 10.32% | 10.353% | — | Wife, divorced |
| ara Levin | 5% | 5.16% | 5.136% | 4.29% | Sister |
| dy Krolik | 7½% | 7.74% | 7.785% | 6.50% | Sister |
| lar Winston, Trustee Nathan Borin Trust for | | | | | |
| Bany Joy Borin | 5% | 5.16% | 5.193% | 4.33% | Daughter |
| Daniel Borin | 5% | 5.16½% | 5.193% | 4.33% | Son |
| Charles Borin | 5% | 5.17% | — | — | Son |
| haes Borin | — | — | 5.188% | 4.32% | Son |
| | 37½% | 38.71% | 38.848% | 23.77% | |
| la Borin | 7½% | 7.74% | 7.785% | 6.50% | Sister-in-law |

Affidavit of George T. Altman

County of Los Angeles,
State of California—ss.

George T. Altman, being first duly sworn, deposes and says:

1. That the facts stated in the foregoing motion are true.

2. That because of the direct testimony of defendant in intervention that she owned no stock in Borin Art Products Corporation and the court's ruling in respect to immateriality of Exhibit U, the significance of the exhibit attached hereto did not come to his attention until the government admitted, February 3, 1958, that the issue of stock in defendant's name was "part of the scheme for dissolution of the corporation and creating the partnership."

/s/ GEORGE T. ALTMAN.

Subscribed and sworn to before me this 21st day of February, 1958.

[Seal] /s/ DOROTHY B. CLOVER,

Notary Public in and for said
County and State. [64]

Points and Authorities

"A new trial may be granted to all or any of the parties and on all or part of the issues * * * in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the

United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." F.R.C.P., Rule 59 (a).

A new trial may be granted in case of surprise. *U. S. v. Kralmann*, (D.C., Ky., 1943) 3 F.R.D. 473, 475.

A new trial may be granted to prevent injustice. *McCracken v. Richmond, F.&R.R. Co.* (C.A. 4, 1957) 240 F. 2d 484.

A federal court has the same power to grant a new trial in the case of conflicting evidence as under other circumstances. *Boudrot v. Cochrane Chemical Co.* (C.C. Mass.) 110 Fed. 919, 922.

A motion for new trial is proper for the purpose of pointing out errors to the trial court and for furnishing a record to court of appeal for review of the trial court's action. *Fine v. Paramount Pictures* (C.A. 7, 1950) 181 F. 2d 300, 302.

A motion for new trial may also be made to give the trial court an opportunity to reexamine the entire factual [65] situation and applicable law. *Miller v. Pacific Mutual Life Ins. Co.* (D.C., Mich., 1954) 17 F.R.D. 121, 125, affirmed 228 F. 2d 889. [66]

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed February 21, 1958.

[Title of District Court and Cause.]

MEMORANDUM IN OPPOSITION TO MOTION FOR NEW TRIAL

Comes Now the defendant and plaintiff in intervention, United States of America, and opposes the motion for new trial by plaintiff and defendant in intervention, Claire B. Morse, for the following reasons:

1. The conclusions of law and the judgment entered thereon are consistent with, and well within, the findings of fact found by the Court to be true.

2. There was no error in law occurring at the trial in entering judgment in favor of defendant upon the Findings of Fact found to be true by the Court. [68]

Points and Authorities

A litigant has no absolute right to a new trial simply because he asks for one. *Walgreen Drug Stores v. Scruggs Drug Store, Inc.* 129 F. 2d 789 (4th Cir. 1942).

New trial should not be granted unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done. *Vanek v. Chicago Great Western R. Co.* 252 Fed. 871 (D.C.N.D. Iowa 1918).

One of the essentials for the granting of a new trial is that the application show affirmatively that a different result would probably follow a new trial. *Blair v. Silver Peak Mines*, 93 Fed. 322 (Circuit Ct., D. Nevada 1899).

Where error of law is relied upon as ground for new trial, it is to be clearly shown by points and reasons not previously presented. *Giant Powder Co. v. California Vigorit Powder Co.*, 5 Fed. 197 (Circuit Ct. D. Calif. 1880).

When the granting of a new trial depends, not on the Court's judgment of the sufficiency of the evidence but upon a question of law, and the granting of a new trial would deprive the successful party of the finding of facts in its favor, the Court may be inclined to deny the motion in order to preserve rights dependent on the findings and permit the law questions to be determined by appeal. *United States v. Alpha Portland Cement Co.*, 257 Fed. 432 (D.C. E.D. Penn. 1919).

A motion for new trial should be based upon manifest error of law or mistake of fact, and a judgment should not be set aside except for substantial reasons. [69] *Solar Laboratories v. Cincinnati Advertising Products Co.*, 34 F. Supp. 783 (D.C. Ohio 1940), appeal dismissed, 116 F. 2d 497. A motion for rehearing on the ground of newly discovered evidence is addressed to the judicial discretion of the Court; but newly discovered evidence must be newly discovered in fact and not such as could have been produced by the exercise of reasonable diligence at the former trial. *Arkansas-Missouri Power Corp. v. City of Rector*, 164 F. 2d 938 (8th Cir. 1947).

The motion for new trial on the ground of newly discovered evidence should be denied for want of diligence in discovering the evidence and because

the alleged newly discovered evidence is merely cumulative. *Pasotex Pipe Line Co. v. Murray*, 168 F. 2d 661 (5th Cir. 1948).

On motion for new trial, the evidence and inferences therefrom must be viewed in light most favorable to prevailing party. *Pelham v. Hendricks*, 132 F. Supp. 774 (D.C. Pa. 1955).

Conclusion

The evidence introduced at the trial adequately supports the decision rendered. The points raised in the motion for new trial should in no way alter said decision, and even if said points or new evidence had been raised or introduced at the trial, it would not have been determinative of the issue presented. They are not relevant and should be accorded no weight.

The conclusions of law and judgment were within the findings of fact. Therefore, it is submitted that the motion for new trial be denied. [70]

LAUGHLIN E. WATERS,

United States Attorney,

EDWARD R. McHALE,

Assistant U. S. Attorney,

Chief, Tax Division,

JOHN G. MESSER,

Assistant U. S. Attorney,

/s/ JOHN G. MESSER,

Attorneys for Defendant and Plaintiff in Intervention, United States of America. [71]

Affidavit of Service by Mail Attached. [72]

[Endorsed]: Filed February 26, 1958.

[Title of District Court and Cause.]

SUPPLEMENT TO MOTION FOR NEW TRIAL

Except from audit report of Samuel H. Weber, certified public accountant, under date of December 19, 1947, a photostatic copy of said report being part of the government's administrative file in this proceeding:

"General Comment

"In the time allotted, it was not possible to make a comprehensive examination of the various enterprises to verify the full extent of Nathan Borin's interest therein. We present below a list of the enterprises examined, and as shown by the books and records, Nathan Borin's interest——

* * * * *

"Borin Art Products Company (Partnership)

"The partnership was organized in May, 1943 succeeding to the business of Borin Art Products Corporation, in operation since 1933. Subject to certain adjustments, the corporate assets, subject to the outstanding liabilities, were transferred to the partnership upon dissolution of the corporation. As of December 31, 1942, the stock of the corporation was held as follows:

| | Number of Shares of |
|--------------------|-------------------------|
| Stockholder | \$100.00 Par Value Each |
| Nathan Borin | 669 |
| Murray Ivers | 200 |

| | Number of Shares of \$100.00 Par Value Each |
|-------------------------|--|
| Stockholder | |
| Lester Witte | 50 |
| Simon Herr | 31 |
| Joseph Levinson | 25 |
| Harold Hoffman | 15 |
| M. Kedzior | 10 |
| Total Outstanding | <u>1000"</u> |

[Endorsed]: Lodged March 3, 1958.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

This matter having come before the Court on motion of the plaintiff for new trial of the above-entitled action, based on the motion, pleadings and memoranda of counsel, and the Court having considered the same, it is

Ordered that said motion for new trial be and is hereby denied.

Dated: March 10th, 1958.

/s/ HARRY C. WESTOVER,
United States District Judge.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed March 11, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that defendant in intervention, Claire B. Morse, hereby appeals to the Court of Appeals for the Ninth Circuit from the judgment entered for plaintiff in intervention, which judgment was entered on February 17, 1958.

Dated this 7th day of March, 1958.

/s/ GEORGE T. ALTMAN,
Attorney for plaintiff and defendant in intervention. [76]

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed March 7, 1958.

[Title of District Court and Cause.]

DOCKET ENTRIES

10/25/56—Fld plfs memo of pts & auths in suppt of mot for prelim injune.

10/25/56—Fld suit for injunction to enjoin defts fr collecting Income Taxes. Fld mot for prelim injune & fld ord for hrg retble 11/5/56. Issd sum Md JS-5.

10/29/56—Fld Sums—re tn svd.

11/ 1/56—Fld defts memo in opposn to plfs mot for prelim injune.

- 11/ 5/56—Entd procs hearg pltfs mot for injunc re collection taxes both sides argue & court ords mot denied on grounds that facts do not warrant granting same. Further ord that Govt atty prepare findings (Heard by Y.)
- 11/ 8/56—Fld reporter's transe of proceedings.
- 11/13/56—Lodged defts prop finds fact, concls law on denial of prelim injunc & ord dnyg prelim injunc.
- 11/15/56—Fld pltfs objecs to find fact, concls law & request for leave to amend complt if such amendment is necessary to clarify allegations.
- 11/20/56—Ent ord overruling plfs obj's to defts finds. Fur ord that sd finds & concls law be fld (Y).
- 11/20/56—Fld finds fact, concls law & ord deny plfs mot for prelim injunc. (Ent 11/21/56 & not attys).
- 11/23/56—Fld stip & ord thereon extg time for deft to plead to 12/10/56.
- 12/ 4/56—Fld defts not of entry of ord denying prelim injunction.
- 12/12/56—Fld stip & ord thereon extdng time of deft to 12/24/56 in wh to plead.
- 12/28/56—Fld stip & ord extendg time for deft to plead to 1/15/57.
- 1/15/57—Fld defts mots to dismiss wiht not mot retble 2/4/57 & memo pts & auths in suppt.

- 1/29/57—Fld amended complt. Fld prae (ltr) for & issd sums on amended complt.
- 1/31/57—Fld sums on amended complt. Retd served.
- 2/ 4/57—Fld pltfs memo of pts & auths in opposn to defts mots to dismiss. Ent ord contg hrg mot of deft (fld 1/15/57) to dismiss to 2/11/57 10 AM.
- 2/11/57—Ent proc hrg mot of deft. (fld 1/15/57) to dismiss and ent ord contg to 2/25/57 10:00 AM for fur hrg.
- 2/11/57—Fld defts interrogs.
- 2/25/57—Ent proc fur hrg mot of deft (fld 1/15/57 to dismiss and on oral mot of deft ord mot w/drawn and deft file an ans to complt. Fur ord striking all interrogs at this time.
- 5/31/57—Fld Answer to amend complt. Fld complt in intervention of USA with ord authorizing.
- 6/12/57—Fld Answer to complt in intervention by Claire B. Morse.
- 6/19/57—Fld suppl to complt with order.
- 6/25/57—Placed on calen Sept 9, 1957 for p/t conference purs to local rule 9 and filed and mld copies Notice to counsel.
- 7/ 1/57—Fld Answer to supplement to complt & ord permitting filing.
- 7/ 2/57—Fld defts affid serv by mail, defts Answer to supple to complt & ord permitting flg.

- 7/12/57—Ent ord contg p/t confer from 9/9/57 to 9/16/57 10 AM. Counsel notifd.
- 8/ 2/57—Fld plfs memo of contentions of fact & law.
- 9/12/57—Fld pltf in intervention USA's p/t memo contentions fact & law.
- 9/16/57—Ent procs & ord contg p/t to 9/23/57 10 AM.
- 9/23/57—Ent procs p/t confer. Fld p/t confer order. Ent ord contg to 11/4/57 11 AM for settg for trial.
- 11/ 4/57—Ent proc & ord settg for trial 1/2/58, 10 AM.
- 11/27/57—Fld stip facts.
- 12/30/57—Fld suppl stmt pts & auths for purpose trial by pltf & deft in interven.
- 1/ 2/58—Ent procs trial. Sw wits. Fld exbs. Ent ord contg to 1/3/58 10 AM for fur trial.
- 1/ 3/58—Ent procs fur trial. Fld exbs. Ent ord finds for govt. Counsel for govt. to prepare finds, concls law & judgt & present on or before 2/3/58.
- 1/10/58—Fld stip & ord thereon extdg time of deft Riddell to & includg 2/3/58 in wh to lodge finds fact.
- 1/24/58—Fld mot in respect cert exbs with not mot retble 2/3/58 & pts & auths.
- 1/30/58—Fld pltf's argument on evidence & law & lodged proposed finds.

- 2/ 3/58—Ent proc hrg mot of plf and deft in intervention in respect of certain exhs and ent ord contg to 2/17/58, 2 PM for fur hrg.
- 2/ 5/58—Lodged defts proposed find fact, conc law & judgt.
- 2/13/58—Fld pltf's objects to finds fact, concls law & judgt lodged by deft.
- 2/17/58—Fld finds fact, concl law & judg that plf hv nothing from deft Riddell & dismiss compl for injunc, & fur fv plf in interv'n USA against deft in interv'n Morse in sum of \$12,000.00 with int, & fv deft Riddell and USA for costs. (Ent 2/17/58 & not attys). JS6. Ent procs fur hrg mot of pltf & deft in intervention in respect of cert exhs & ent ord denying mot. Ct signs finds & judgt present by the govt.
- 2/19/58—Fld ord denying mot in re certain exhs.
- 2/21/58—Fld not deft entry judgt & fld defts cost bill. Fld mot of Claire B. Morse retble 3/3/58 10 AM for new trial with exhs, affid of Geo. T. Altman & memo of pts & auths in suppt thereof.
- 2/26/58—Fld memo deft & pltf in intervention in opposn to mot for new trial. Taxed costs fav deft \$26.00, dktd & ent costs.
- 3/ 3/58—Ent proc hrg & ord denyg mot of pltf & deft in intervention for new trial. Lodged supple to mot for new trial.

- 3/ 7/58—Fld not appeal Claire B. Morse, pltf & deft in intervention. Copy received by John Messer, Asst. U. S. Atty. Fld cash bond in amt of \$250.00. Fld desig contents rec on appeal & fld state pts on which pltf, etc, intends to rely.
- 3/11/58—Fld ord denying mot for new trial. Fld amend pltf & deft in intervention to desig contents record on appeal & fld amend to statement of pts on wh pltf & deft in intervention intends to rely.
- 3/17/58—Fld pltf in interventions add desig record on appeal.
- 3/18/58—Fld plts 2nd amend to stmnt pts on wh pltf, deft in interven intends to rely & fld 2nd amend to desig contents record on appeal.
- 3/19/58—Fld repr's transe for 2/17/58.
- 3/27/58—Fld orig reporters trans predgs (6 vols) dtd 1/2 & 1/3/58, 2/3/58, 2/11/57, 2/17/58, 2/25/57 & 3/1/58. [103]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above entitled Court, hereby certify the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above entitled case:

A. The foregoing pages numbered 1 to 103, inclusive, containing the original:

Complaint in Intervention.

Answer to Complaint in Intervention.

Pre-trial Conference Order.

Stipulation, filed 11/27/57.

Notice of Motion and Motion in Respect of certain Exhibits.

Findings proposed by Plaintiff, Defendant in Intervention.

Plaintiff's objections to Findings of Fact, Conclusions of Law and Judgment lodged by Defendant.

Findings of Fact, Conclusions of Law and Judgment.

Order denying Motion in respect of certain Exhibits.

Notice of Motion and Motion for New Trial.

Memorandum in opposition to Motion for New Trial.

Supplement to Motion for New Trial.

Order denying Motion for New Trial.

Notice of Appeal.

Designation of Contents of Record on Appeal.

Statement of Points on which Plaintiff, Defendant in Intervention intends to rely.

Amendment to Designation of Contents of Record on Appeal.

Amendment to Statement of Points on which Plaintiff, Defendant in Intervention, intends to rely.

Plaintiff in Intervention's additional Designation of Record on Appeal.

Second Amendment to Designation of Contents of Record on Appeal in response to Designation of Plaintiff in Intervention.

Second Amendment to Statement of Points on which Plaintiff, Defendant in Intervention, intends to rely.

(Copy) Docket Entries.

B. Plaintiff's Exhibits—1, 2, 3, 6, 7, 9, 10, 11, 12, 13. Defendant's Exhibits—A, B, C, L, M, N, O, P, Q, R, S, T, U, V, W, Z.

C. Six volumes of Reporter's Official Transcript of Proceedings had on: 2/11/57 and 2/25/57—1/2/58, 1/3/58, 2/3/58, 2/17/58 and 3/3/58.

I further certify that my fee for preparing the foregoing record, amounting to \$2.00, has been paid by appellant.

Dated: Los Angeles, California, this 3rd day of April, 1958.

[Seal]

JOHN A. CHILDRESS,
Clerk,

/s/ By WM. A. WHITE,
Deputy Clerk.

In The United States District Court, Southern
District of California, Central Division

No. 20638-HW Civil

CLAIRE B. MORSE, Plaintiff,
vs.

ROBERT A. RIDDELL, District Director,
Defendant.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

CLAIRE B. MORSE, Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California
Thursday, January 2, 1958

Honorable Harry C. Westover, Judge Presiding.

Appearances: For the Government: Laughlin E. Waters, United States Attorney; by John G. Messer, Assistant United States Attorney, and Eugene Harpole, Assistant United States Attorney. For Claire B. Morse: George T. Altman, Esq., 233 South Beverly Drive, Beverly Hills, California. [2]*

* * * * *

Mr. Altman: To begin, your Honor, we have agreed on a very slight correction in a paragraph of the pretrial order. On page 3, Paragraph 11,

* Page numbers appearing at top of page of Reporter's Transcript of Record.

where it starts out with the words "The United States had previously assessed" we have agreed—counsel can check me on this—to insert in the second line of that paragraph after the word "corporation," the following words:

The Court: What line is that now?

Mr. Altman: Line 28, I believe.

The Court: Page 3?

Mr. Altman: Yes, page 3.

The Court: All right.

Mr. Altman: The line beginning with the words "Plaintiff as alleged transferee."

The Court: All right.

Mr. Altman: We have agreed to insert after the [3] word "corporation," the words "because of the distribution upon dissolution of said corporation," with commas before and after that insertion.

The Court: Now, let's see.

"Plaintiff as alleged transferee of the said corporation," because of what?

Mr. Altman: "Because of the distribution on dissolution of said corporation," with commas before and after.

The Court: All right.

Mr. Altman: I believe, also, that we have agreed that the records may include to the extent material the case reports in the following three cases, all of them headed *Borin vs. Borin* which, as you can see, your Honor, would be litigation in which the taxpayer here was a party. I will give you the citations. 329 Illinois Appellate 188, 67 Northeastern (2d) 423; 335 Illinois Appellate 450, 82 North-

eastern (2d) 70; and the third one is 343 Illinois Appellate 649, 100 Northeastern (2d) 333.

The Court: Let's see if I have those now. That is 67 Northeastern (2d) 423, 82 Northeastern (2d) 70, and 100 Northeastern (2d) 333.

Mr. Altman: Yes. The understanding is that to the extent to which these case reports are material here, they may be included as part of the record.

The Court: All right. [4]

* * * * *

JOHN L. HARRIS

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination

Q. (By Mr. Altman): Mr. Harris, what is your business or occupation?

A. Examiner of questioned documents and handwriting expert.

Mr. Messer: Your Honor, in order to save time, I believe we will stipulate that Mr. Harris is qualified as a [6] handwriting expert. [7]

* * * * *

Q. Mr. Harris, I have another document here entitled "Agreement," being a positive photostat of a document recorded in Book 38240 at Page 213.

Mr. Altman: May this be marked for identification as No. 8?

The Court: It may be marked.

(Testimony of John L. Harris.)

The Clerk: Just a minute. Is that one of the other exhibits that have been marked?

Mr. Altman: Yes. This is the same thing.

The Clerk: Then that is Exhibit No. 1, your Honor, which has already been marked.

Mr. Altman: This is the same thing.

Q. Mr. Harris, will you give me your opinion, also, of what purports to be the signature of Claire Borin on page [9] 10 of this Exhibit No. 1.

A. In my opinion, based on an examination I made of this signature and a comparison of the genuine signatures on Exhibit 5, I would say in my judgment the Claire Borin signature on Exhibit 1 is an imitation of the genuine handwriting of Claire Borin and was not, in my opinion, written by the same person who wrote the genuine signatures.

Q. Mr. Harris, I would like to ask you, also, in regard to this document, whether it appears that someone tried to imitate her signature?

Mr. Messer: I object to that, what somebody tried to do, whether somebody tried to imitate the signature.

The Court: May I ask the witness a question?

The Witness: Certainly, your Honor.

The Court: You say that is not her signature. Is that a traced signature?

The Witness: No, it is not, your Honor. I would say it is just an imitation.

The Court: An imitation?

The Witness: It is an attempt to copy a signature. It is not like the one on the income tax return

(Testimony of John L. Harris.)

which shows no resemblance to her signature at all, but this signature does have some resemblance to the genuine handwriting.

Q. (By Mr. Altman): You say it is an attempt to copy her signature? [10]

A. It might be. That would be my opinion, yes. [11]

* * * * *

CLAIRE MORSE

the plaintiff herein, called as a witness in her own behalf, having been first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination

Q. (By Mr. Altman): Mrs. Morse, your name, your previous name, was Claire Buchman or Claire B. Buchman, is that correct? A. Yes.

Q. That is B-u-c-h-m-a-n? A. Yes.

Q. And before that it was Claire Borin?

A. Yes.

Q. You were the wife of Nathan Borin, is that correct? [17] A. Yes.

Q. Will you state the year in which you were married to Mr. Borin?

A. November 11, 1933. [18]

* * * * *

Q. (By Mr. Altman): Were you married to Mr. Borin at the time of his death? A. No.

Q. You had been divorced from him?

A. Yes.

The Court: Well, when were you divorced?

(Testimony of Claire Morse.)

The Witness: I was divorced in 1949.

The Court: What month?

The Witness: March 1, 1949. [19]

* * * * *

Q. (By Mr. Altman): Mrs. Morse, did Mr. Borin ask you to sign a large check, I mean endorse a large check for him? A. Yes, he did.

Q. How much was the check?

A. \$10,000.

Q. Was that just before you left for Florida?

A. Very shortly, about a week before I left.

Q. Did you endorse it for him?

A. Not at that time.

Q. Did you later? [21] A. I did.

Q. Before you went to Florida?

A. Before I left for Florida.

* * * * *

Q. Was it a check made out to you that you endorsed, do you remember?

Mr. Altman: I will withdraw that, your Honor, because that seems to be a rather foolish question.

The Court: It might have been made payable to both the husband and wife.

Was it made out payable to you individually or to you and your husband?

The Witness: I believe, your Honor, it was made out to me.

The Court: Individually?

The Witness: Yes, sir.

The Court: Where did the check come from?

(Testimony of Claire Morse.)

The Witness: It was a business check—I mean in his business.

The Court: The firm's business?

The Witness: The name of his business. [22]

* * * * *

The Court: Did you ever own any stock in the corporation?

The Witness: No, never owned anything.

The Court: Did you ever attend a meeting of the board of directors?

The Witness: No, sir.

The Court: Did you ever attend an annual meeting of stockholders?

The Witness: Never.

The Court: Did you ever receive any dividends from the corporation?

The Witness: No, your Honor, never received anything.

The Court: Then the corporation was liquidated, wasn't it?

The Witness: I never knew anything about his business, your Honor. He never discussed his business with me. [26]

The Court: When this so-called partnership was formed, were you given a copy of the partnership agreement?

The Witness: I never knew it was formed. I never knew anything about it, nothing.

The Court: Let me see the exhibits. I want to call your attention to Exhibit 1, which is supposed to be a limited partnership agreement. Prior to

(Testimony of Claire Morse.)

going to Florida in 1945, had you ever seen this agreement?

The Witness: No, your Honor.

The Court: When did you first see the agreement?

The Witness: The first—after I returned from Florida and I filed suit for divorce, I had returned and found documents in our apartment and I had immediately taken them to my attorney, who at that time represented me in Chicago, and turned all these documents over to him. But I did not know the meaning or anything about them.

The Court: I didn't ask you if you knew what the documents meant. I said when did you first see the documents?

The Witness: I never saw a document until I was told I signed a document that I was a partner, which I never saw.

The Court: Who told you you were a partner?

The Witness: Well, when I returned from Florida with my child, I had filed separation proceedings two days [27] later, and upon my return to our home in Chicago, I found all these documents in our room, and I took them to my attorney, who at that time was Benjamin B. Davis in Chicago, and he went over all these papers, which he then at that time told me that did I know—

The Court: Don't tell me what he told you. When did you return from Florida?

The Witness: I returned from Florida in March.

The Court: What year?

(Testimony of Claire Morse.)

The Witness: 1945.

The Court: When did you go to Florida?

The Witness: February 1945.

The Court: Then you were down there just about a month, is that right?

The Witness: Yes, your Honor.

The Court: Then you came back and filed divorce proceedings?

The Witness: Yes.

The Court: You found some papers in your home?

The Witness: Yes.

The Court: And you took those papers to your lawyer?

The Witness: Yes, your Honor.

The Court: Was this Exhibit 1 among the papers you took to your lawyer, or do you remember?

The Witness: I don't remember. I just turned over a lot of papers, but I did not understand.

The Court: When did you first discover you were supposed to have signed this Exhibit No. 1?

The Witness: When I had taken—I don't know. I just don't remember. There were so many court proceedings in the divorce.

The Court: You took these papers to your lawyer?

The Witness: Yes.

The Court: You say your lawyer looked at them?

The Witness: Yes.

(Testimony of Claire Morse.)

The Court: Did he ever discuss with you this Exhibit 1?

The Witness: No, sir, he did not.

The Court: Did you ever tell your lawyer that you had not signed Exhibit 1?

The Witness: I didn't know—he never discussed this with me. He just asked me if I had known I was—if I had some interest in the business which I knew anything about, because he said certain papers indicated that I had some interest, which I never knew anything about, because he said certain papers indicated that I had some interest, which I never knew anything about, and it proceeded on and on and on, and up to this day, your Honor, I still don't know.

The Court: Prior to your divorce from Mr. Borin, [29] was there a property settlement agreement?

The Witness: Yes, there was.

The Court: Did the property settlement agreement say anything about this so-called interest you had?

The Witness: No, sir.

The Court: Have we got a copy of the property settlement agreement?

Mr. Altman: I really don't know. I do have here as a witness the attorney who handled her divorce.

The Court: I know, but the property settlement agreement is the best evidence. I don't think an attorney can testify from memory now as to what was contained in the property settlement agreement.

(Testimony of Claire Morse.)

If you have the attorney who handled the divorce, he ought to have a copy of the property settlement agreement somewhere. [30]

* * * * *

The Court: Are you willing to stipulate that this corporation existed prior to the marriage of Mr. and Mrs. Borin?

Mr. Messer: The documents I have indicate that this corporation was incorporated under the laws of the State of Illinois on September 15, 1932, Borin Art Products Corporation. [34]

* * * * *

The Court: Have you got any transcript of the stock record to show it was issued to her?

Mr. Messer: No. Mr. Altman and I have gone into that. I think we will both agree that there was nothing. There was a fire here, your Honor, and many of the records of the corporation, unfortunately, were destroyed.

The Court: There is such a thing as having stock written up in the name of the party and the stock certificate never delivered, or such a thing as the husband having the stock certificate written up and taking the stock certificate but never giving it to the wife.

Mr. Messer: That is very true, your Honor. There are many situations where a person may have no knowledge of what may be on a certificate. I think I may be out of order, your Honor. [35]

* * * * *

The Court: I am going to assume that there is

(Testimony of Claire Morse.)

no question of res judicata. I am going to assume the matter has not been decided by a court, that is the interests of this witness in the partnership or in the corporation.

Mr. Altman: Except to this extent, may I say, your Honor, that there was a decree of divorce and the decree makes no reference of any kind to any interest in a partnership.

The Court: I am going to still assume that there is no court that has passed upon this particular question.

Mr. Altman: I have no objection to that, your Honor. [36]

* * * * *

The Court: Let me do something here I think the attorney should have done in the first place.

I want to show the witness Exhibit 1. I call your attention to the signature Claire Borin. Is that your signature?

The Witness: No, your Honor. [43]

* * * * *

Mr. Altman: May I interrupt at this time my questioning to tell you that I have found the final divorce decree. If the Government wants this put into evidence I will be glad to put it in. I have no purpose in putting it in myself, but here it is. That is the final divorce decree.

Mr. Messer: I have no objection. I see no purpose in it unless it refers to some interests we are concerned with.

The Court: Then let's leave it out then.

(Testimony of Claire Morse.)

Mr. Messer: That's right, your Honor.

The Court: There is no use encumbering the record.

Mr. Messer: That's right. I would just as soon not have it in.

The Court: All right.

Q. (By Mr. Altman): Mrs. Morse, I would like to show you Plaintiff's Exhibit 6, being the 1944 return, apparently bearing your signature, and will ask you whether at the time you signed it there was anything on the return except the printed part of it?

A. No. It was a complete blank.

Q. Do you remember where you signed it?

A. I believe I was away when it was mailed to me in Florida. I am not sure now.

Q. Did anyone call you up about it or write in about it? [45]

A. Mr. Locker, who at that time worked for Mr. Borin, called me in Florida and said he was mailing me some papers to sign, and he mailed them, and I signed them and mailed them right back.

Q. You say this was completely blank at the time you signed it? A. Completely.

Q. Coming back, Mrs. Morse, to Plaintiff's Exhibit 8, there is a document here as one of the three, which reads, "Notice of Waiver of Restriction on Assessment and Collection of Deficiency in Tax," and the other two read "Consent Fixing Period of

(Testimony of Claire Morse.)

Limitation Upon Assessment of Income and Profits Tax."

In regard to this one that reads Waiver of Restriction, at the time that you signed it, did you understand it to be an agreement to pay the tax?

A. Certainly not. I just signed it. [46]

* * * * *

Mr. Altman: I wonder if your Honor would be willing to read this letter again in connection with those three documents. You will notice all three are stamped by the Revenue Office as received March 19th, the three of them.

The Court: Do you remember from whom the document was, or who wrote the document, or who signed the document dated March 13, 1951?

The Witness: This letter, your Honor?

The Court: Yes.

The Witness: Mr. Nathan H. Rosenthal of Chicago.

The Court: Who was he?

The Witness: He was representing me.

The Court: Your attorney?

The Witness: Yes.

The Court: He was an attorney, was he?

The Witness: Yes.

The Court: And he sent you this letter dated March 13? [47]

The Witness: Yes, your Honor.

The Court: It is your testimony, is it, that these documents that have been marked Exhibit 8 were included in the letter of March 13?

(Testimony of Claire Morse.)

The Witness: Yes, your Honor. [48]

* * * * *

The Court: May I ask the witness a question? You received all these documents at one time, did you?

The Witness: Yes, your Honor, I did. [51]

The Court: They were all in one letter?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Altman): Mrs. Morse, did you ever receive any salary from the Borin Art Products Corporation? A. No, sir.

Q. Did you ever receive any salary from Borin Art Products Company——

Mr. Messer: I object, your Honor, on the ground of immateriality, whether she received any salary or whether she worked for them. It is the question here whether she was a transferee of the property.

* * * * *

The Court: Objection sustained.

Mr. Altman: Your Honor, my reason for the question, if I may now explain, is the document, Plaintiff's Exhibit 1, shows that she was to receive a salary. Naturally, if she received a salary she would know what she was doing there.

The Court: She said she never knew anything about this document. [52]

Mr. Altman: Thank you.

* * * * *

Q. (By Mr. Altman): Mrs. Morse, other than the checks for your household expenses, did you

(Testimony of Claire Morse.)

ever receive any money or property from Mr. Nathan Borin or from his corporation or what is purported to be his partnership, Borin Art Products Company? A. No, never.

Mr. Messer: I object to the question.

The Court: Sustained. You let the Government prove whatever she got and don't try to cover everything. The Government may be able to pinpoint this. [53]

* * * * *

Q. (By Mr. Altman): Did you ever receive any money or property as a shareholder of Borin Art Products Corporation? A. No, sir, never.

Mr. Messer: I object to that question.

The Court: I asked her that once before and she said no, and you didn't object then. I asked her if she got anything from the corporation and she said no. I asked her if she was a stockholder or officer or ever attended stockholders' meetings or board of directors' meetings.

The objection is overruled.

Q. (By Mr. Altman): Did you ever receive any money or [54] property as a partner from the Borin Art Products Company?

A. No, sir, never.

* * * * *

Cross Examination

Q. (By Mr. Messer): Mrs. Morse, at this time I hand you Defendant's Exhibits D through K marked for identification and I ask you to look at the signature on each of these documents.

(Testimony of Claire Morse.)

A. Yes.

Q. Is the signature on each of these documents your signature? [55]

A. Yes, they are.

Q. I ask you to look at Exhibit D marked for identification and tell me whether or not you signed that document?

A. Yes, I did. [56]

* * * * *

The Court: May I ask the witness, did you pay any tax for 1941?

The Witness: I didn't, your Honor. At that time I was always getting papers to sign and I signed them. I didn't know what they meant. I have never paid any tax. [58]

* * * * *

Q. (By Mr. Messer): Mrs. Morse, I show you Government's Exhibit L marked for identification, headed "Transferee Agreement" dated February 8, 1946, and also Exhibit M marked for identification, a transfer agreement dated February 8, 1946, and I will ask you if the signature shown on each of those two documents is yours?

A. Yes.

Q. You signed those two documents, did you not?

A. Yes.

Q. Now, Mrs. Morse, I show you Exhibit N marked for identification, headed Form 977, Treasury Department, dated January 14, 1947, headed, "Consent Fixing Period of Limitation Upon Assessment of Liability at Law or in Equity," etc. Is that your signature?

A. Yes.

Q. Mrs. Morse, I show you a document marked Exhibit O for identification, Form 977, dated De-

(Testimony of Claire Morse.)

September 4, 1947, headed "Consent Fixing Period of Limitation Upon Assessment of Liability at Law or in Equity," etc. Is that your signature on that document? A. Yes.

Q. I will ask you further, not only is that your signature on that document, but more specifically you did sign those documents, did you not? [62]

A. I signed them, but I never read them.

Q. You signed them?

A. They were mailed to me. I had been signing them for years, considering them waivers of time, upon my attorney's advice to just mail them.

Q. You signed them and sent them to your attorney? A. My attorney, yes.

Q. Who was representing you in this litigation?

A. All my litigation. [63]

* * * * *

The Court: May I inquire, is this tax which is alleged to be due the tax of the corporation or the tax of the partnership?

Mr. Messer: It is the corporation in this suit, your Honor.

The Court: It is the corporation tax?

Mr. Messer: Borin Art Products Corporation.

The Court: Is that right?

Mr. Altman: What is that?

The Court: Is the tax in this suit the tax of the Corporation?

Mr. Altman: It is the tax of the Borin Art Products Corporation, that is correct. [64]

* * * * *

(Testimony of Claire Morse.)

Mr. Messer: At this time I wish to offer in evidence Government's Exhibits P, Q, R and S for identification, which are the partnership returns of income for the years 1943, 1944, a short period of 1945, and 1946.

The Court: Now have you got an objection?

Mr. Altman: I will object to the admission of any of these forms, your Honor. As to these, and I say, she has no connection with them. Unless she had some connection with them, I am going to object to their admission.

The Court: Overruled. That is a question for the court to decide. They may be marked in evidence.

* * * * *

Q. (By Mr. Messer): Mrs. Morse, on or about February 8th or thereabouts, 1946, did you file an action in a Chicago court for dissolution of the partnership of Borin Art Products Company?

A. I didn't. I don't know what my attorneys filed. I was having court proceedings and I turned over all documents to them and they proceeded from then on. I don't know what [65] has been filed and what happened. I can't say really.

Q. Let me ask you this. Did you have knowledge that your attorneys were filing a complaint in chancery for the dissolution of the partnership of Borin Art Products Company?

A. I can only answer it this way. They were just protecting me. I was trying to get a divorce. There was litigation for four years. I don't know

(Testimony of Claire Morse.)

what they were doing. They never explained all the details to me. [66]

* * * * *

Q. (By Mr. Messer): Mrs. Morse, I ask you to look at Government's Exhibit T marked for identification, headed State of Illinois, County of Cook, in the Circuit Court of Cook County in Chancery, Claire Borin vs. Nathan Borin, L. V. Locker, et al., No. 46C1685, headed, "Complaint in Chancery for Dissolution of Partnership, Accounting, and Other Relief."

Turning to page 6 of said document, I ask you to look at the signature thereon. A. Yes.

Q. Is that your signature? A. Yes, it is.

Q. You signed that document? A. Yes.

Q. I turn now to page 7 of the same document and ask you to look at the signature thereon.

A. Yes.

Q. Is that your signature? A. Yes, it is.

Q. You signed that document? A. I did.

Q. On or about the date shown?

A. I can't remember that. That is my signature.

Q. Let me ask you this. Do you recall signing this particular page before a notary? [67]

A. I don't remember. I have signed so many papers.

Q. You don't recall at the time you made both of these signatures whether one of them was before a notary or not?

A. I have signed so many documents I can't recall them all.

* * * * *

(Testimony of Claire Morse.)

The Court: Counsel, I notice in Exhibit T, according to that exhibit, it says under date of September 18, 1945, she received from the Borin Art Products Company a letter purporting to terminate plaintiff's interest in said partnership, copy of which letter is attached hereto, marked Exhibit B.

Mr. Messer: We don't have those copies, your Honor. They weren't attached to that. I would be glad to introduce it if we could have that.

The Court: The letter certainly is a part of this complaint.

Mr. Messer: The complaint, however, her allegations in it, that is true, are the important part, the part we are introducing it for, your Honor, the part where she alleges her interest in the partnership and has asked for [68] dissolution of the partnership. [69]

* * * * *

Mr. Altman: One more point. I believe counsel and I have agreed at this point I might, if I like, introduce Plaintiff's Exhibit 1 for identification. That is the partnership agreement, the exemplified copy, which is now in the record.

Is there any objection?

Mr. Messer: If I understand what counsel just said, you are introducing it for identification?

Mr. Altman: No.

The Court: Are you offering it in evidence?

Mr. Altman: That is correct. I thought you had [70] agreed to that.

(Testimony of Claire Morse.)

Mr. Messer: But you said for identification. We talked about in evidence.

The Court: It may be received in evidence.

The Clerk: Plaintiff's Exhibit 1 in evidence.

* * * * *

Mr. Messer: Your Honor, at this time I would like [71] to introduce Defendant's Exhibit U for identification in evidence. Said exhibit is entitled "Abstract of Record, No. 43689, in the Appellate Court of Illinois, First District, April Term, A.D., 1946."

I direct the court's attention particularly to page 2, the paragraph on page 2 at the bottom thereof which ends on page 3.

The Court: Any objection?

Mr. Altman: I don't think so. May I take a quick look at it?

Your Honor, I have agreed with counsel that this was actually taken from the records of the Appellate Court of Illinois, and that was the reason I marked on it over my signature, "Need not be certified."

I may also say counsel has referred only to certain pages. I may want to refer to any part of it.

The Court: You can do so.

Mr. Altman: May I say, also, if counsel will check it, that I believe this was a case which was involved in 335 Illinois Appellate previously referred to. I believe it was.

The Court: It may be received in evidence.

Mr. Messer: I meant to offer in evidence the

(Testimony of Claire Morse.)

entire document. I was merely directing your attention to that part of it. [72]

The Court: The entire document is received in evidence.

The Clerk: Defendant's Exhibit U in evidence.

* * * * *

The Court: Exhibit U is an abstract of record on appeal. Does Exhibit U refer to the same case as Exhibit T?

Mr. Messer: No, your Honor. Exhibit U refers to a divorce action commencing in Illinois.

The Court: Whatever happened to Exhibit T?

Mr. Messer: That is the complaint for dissolution. That is a complaint in chancery for dissolution. That is a separate complaint entirely.

The Court: What happened to it? Was it ever prosecuted?

Mr. Messer: I don't know, your Honor. That was brought in 1946. It is when the partnership went out of existence. [73]

* * * * *

Mr. Messer: The Government at this time offers in evidence Exhibit marked V for identification, which is certificate of assessments and payments in re Claire Borin Buchman, transferee, for the period herein involved, the year 1941, and the period from January 1, 1943 to April 30, 1943.

Mr. Altman: Your Honor, I would like to object to that on the ground I think it is incumbent upon the Government to show that the taxes of this corporation have not been paid, that they are not ask-

(Testimony of Claire Morse.)

ing her to pay something that for all we know may have been paid by someone else. [74]

Mr. Messer: Your Honor, that is for the taxpayer to present.

The Court: Objection overruled. It may be received in evidence.

* * * * *

Q. (By Mr. Messer): Mrs. Morse, did I understand you correctly when you testified that during all the time that you were asked to sign these particular documents which you had exhibited to you and identified as being those which you had signed, that you were represented by an attorney in these proceedings?

A. Well, I wish to correct myself. I was represented by Mr. A. C. Rosenthal, who was an accountant who handled these matters for me. I was in California all during this time that they were under his——

Q. You received these documents, then, from either your certified public accountant or from an attorney? A. Yes.

Q. You didn't receive them from your husband, did you, or from your former husband, Mr. Nathan Borin? A. No.

Q. When they were sent to you by the CPA, or the attorney, were you requested to sign and return them to him? [75] A. Yes.

Q. Do you recall who your attorney was in your action for divorce in March 1945?

A. I had several attorneys in 1945, Martin Mc-

(Testimony of Claire Morse.)

Nally, James McDermott, I think Mr. Gold, and Mr. A. C. Lewis.

Q. On the return which you testified was sent to you in blank to Florida, how did you know it had nothing on it? I believe you testified it had nothing on it.

A. It had nothing on it. When I left Chicago I had endorsed that \$10,000 check. I was reluctant to sign anything. Mr. Locker had phoned me from Chicago and said it was just something that they needed and naturally, when you are married and you try to have faith, you go ahead and sign. I signed it and returned it.

Q. But you testified it had nothing on it, that it was absolutely blank.

A. Absolutely blank.

Q. Then you read the entire form, did you not?

A. No. I just signed it and put it in the mail and mailed it back.

Q. Then you don't know whether it was in blank or not?

A. There was no writing, no script writing.

Q. Any typing on it?

A. A regular form, like all business forms.

Q. Was there typing on it? [76]

The Court: When you say it was blank, you mean it was printed with blank lines and there was nothing in the lines.

The Witness: Yes, your Honor.

Q. (By Mr. Messer): No figures whatever anywhere on the form? A. No, sir.

(Testimony of Claire Morse.)

Q. Then you read the form thoroughly to find that out, didn't you? A. I never read it.

The Court: You don't have to read a form. You can take a form and look at it and read it to see whether there is anything written in it.

Mr. Messer: An income tax return which has only a distributable share in a partnership income usually has about one item on it and, well, a person looking at it, they could easily skip over the one item that was filled in. I want to know how she knew it had nothing on it.

The Court: She looked at it.

Mr. Messer: She must have read it.

Q. You knew what the form was, didn't you?

The Court: She said she looked at it. You don't have to read it.

Q. (By Mr. Messer): Let me ask you. Did you know it was an income tax return? [77]

A. I don't know what it was, really. Just like I received one yesterday at our house. I turned it over to my husband. I looked at it and said, "This is something for you." [78]

* * * * *

The Court: May I inquire, have you collected taxes from the other members of the partnership?

Mr. Messer: I do not know that, your Honor. That was in Chicago. That is not part of the Government's case. [86]

* * * * *

The Court: Do you know what happened to this case that was filed in Cook County against Nathan

(Testimony of Claire Morse.)

Borin and the fire insurance companies relative to the payment of the insurance? Do you know what happened to that case?

The Witness: No, I don't, your Honor, because I had so much litigation going on in my divorce troubles, and everything was in the hands of attorneys, and I left everything to them. I really don't know anything about it.

The Court: Wouldn't you know if there was a [92] settlement made of some kind.

The Witness: All I remember is that, I don't remember the attorney's name, but he was supposed to have—I mean he was representing me, and he also had me sign some papers, and I thought they were something pertaining to helping me, and I signed a release for all the insurance policies, about nine of them, which I learned later that I released \$900,000 to Nathan Borin, and he mentioned all the records at that time in this factory were burned and no one knew anything, but I also signed papers like that, as well as some of these other papers. [93]

* * * * *

The Court: I want to know if this witness got anything other than this so-called partnership agreement.

Mr. Messer: I don't think any of the others got anything except the so-called partnership agreement, because the thing went flat on its face and they were held for the corporation taxes. [98]

* * * * *

The Court: Well, legally you may be right,

(Testimony of Claire Morse.)

counsel, but morally and equitably, I don't think you are.

Mr. Messer: Your Honor, morally and equitably we fight a lot of these cases that hurt us as much as anyone. I have one now that I wish I didn't have.

The Court: Bring it here and I will get rid of it for you.

Mr. Messer: I know, your Honor, that harsh cases [99] come along in taxes. Taxes are harsh for all of us. It is a harsh case. [100]

* * * * *

The Court: * * * The only thing she reports in 1944 is this \$32,239.

Mr. Messer: That's right. That is her distributable share of the partnership income for that year.

The Court: She already paid taxes on that of \$14,114.

Mr. Messer: Those are income taxes from her distributable share of the partnership. The partner doesn't have to receive the money, your Honor.

The Court: Let me ask this witness a question. Do you remember this 1944 return you filed?

The Witness: I remember being mailed that to Florida. It was mailed to me in Florida.

The Court: All right. Now, it says, "Enter your tax from table on page 2," and you enter your tax of \$14,925.62.

"By payments of 1944 declaration of estimated tax \$14,114.51."

(Testimony of Claire Morse.)

The Witness: But, your Honor, there was nothing in there. It was blank. [102]

The Court: It was blank?

The Witness: Yes.

The Court: You are sure when you signed this one that none of these signatures was on the form at all?

The Witness: Nothing. There was just nothing. It was mailed to me just like the other. He said it was urgent and to return it immediately.

The Court: Do you recognize this signature, L-o-c-k-e-r?

The Witness: I don't know, but it was Mr. Locker that worked for the company. I don't know whether that is his signature or not, because it is so many years ago. This is 1945.

The Court: Was his signature on this form when you signed it?

The Witness: It must be, because I spoke to him long distance. I tried to reach Mr. Borin on account of our child and I wasn't able to reach him, so I phoned the office, and Mr. Locker told me he was mailing me some papers.

I said, "I am not going to sign anything."

He said, "It is urgent for the business."

He mailed it and I signed it and mailed it right back.

The Court: You didn't make this \$14,000 payment, did you? [103]

The Witness: No, sir. I have never seen anything. I have never known anything about it. I have

(Testimony of Claire Morse.)

never made any payments. I don't know anything about it.

The Court: When did you first see this income tax return after you signed it and sent it back to Chicago? When did you see this return?

The Witness: I didn't see any of these things until after my divorce action, and I put myself on record at the Internal Revenue, because I had endorsed this \$10,000 check, which I wanted to know what I did and I was being involved in a lot of trouble. The rest of the procedures went on with my attorneys, and from 1945 to 1949 I was being—I wasn't divorced until four years later. [104]

* * * * *

Mr. Messer: I know it is a harsh case, but it would be harsh on [107] all these other twelve or fourteen partners who had an interest. [108]

* * * * *

Redirect Examination

Q. (By Mr. Altman): Mrs. Morse, referring to Plaintiff's Exhibit 1, referring to what appears to be your name on page 10, did you authorize anyone to sign that for you? A. No, sir, never. [118]

* * * * *

Q. (By Mr. Altman): References have been made here to a certain abstract, Mrs. Morse, being Defendant's Exhibit U, and I will ask you again whether the proceedings which were filed on your behalf were prepared by your attorneys.

A. Yes.

* * * * *

(Testimony of Claire Morse.)

Q. Mrs. Morse, did you yourself inform your attorneys that you were a partner? A. No.

Q. Mrs. Morse, did you sign documents prepared by attorneys in faith upon what they represented the documents to be? A. Yes, I did. [119]

* * * * *

Q. (By Mr. Altman): Mrs. Morse, have you had any business experience? A. No, sir.

Q. Were you ever qualified for any work in connection with the Borin Art Products Company?

A. No, sir.

Mr. Messer: I object to that line of questioning.

The Court: Sustained. I don't think it makes any difference at all. The court is satisfied she doesn't know anything about business practices.

* * * * *

Q. (By Mr. Altman): Mrs. Morse, prior to March 1945 when you found the documents in the apartment and brought them to your attorney, did you have any knowledge whether Mr. Borin had you down as a partner on his records?

A. No.

Mr. Messer: Object to that.

The Court: Sustained. We have gone into that before. I think you are just going over and rehashing the testimony that has been introduced. [124]

* * * * *

Recross Examination

Q. (By Mr. Messer): Mrs. Morse, Exhibit T, I believe you testified this [125] was your signature on this complaint in Chancery. Could you tell us,

(Testimony of Claire Morse.)

did you discuss with your attorney prior to the time you signed this concerning your action? Did you have any conference with him or talk to him over the telephone?

A. Which litigation is this? I don't know.

* * * * *

The Court: Do you remember the conversation you had with your attorney relative to the filing of this complaint?

The Witness: Your Honor, I had all these documents and I just turned them over to my attorney and he proceeded from then on. It was concerning my divorce mostly. He proceeded with other things, but I don't know what they are today.

Q. (By Mr. Messer): Is it possible in these papers you turned over to him to look over a copy of this partnership [126] agreement which was among those papers?

A. I don't remember any partnership agreement.

Q. Is it possible it could have been in those papers? A. I don't know. I just don't know.

Q. Then you don't recall discussing this partnership with your attorney before you filed this complaint?

A. All I know is I turned all of the documents over to him. I was mainly interested in my divorce and my child, and the rest proceeded, which I don't know anything about.

* * * * *

A. C. LEWIS

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows: [127]

* * * * *

Direct Examination

Q. (By Mr. Altman): Mr. Lewis, are you an attorney? A. I am.

* * * * *

Q. Mr. Lewis, did you at one time represent Mrs. Claire Morse in litigation? A. I did.

* * * * *

Q. Now, Mr. Lewis, did you handle the final divorce proceeding? [128] A. I did. [129]

* * * * *

Q. (By Mr. Altman): Mr. Lewis, will you explain the reason for the changes from the amended complaint in the [136] second amended complaint?

A. Yes, sir. The amended complaint charged the offense of adultery. After the filing of that, I got Mr. and Mrs. Borin together in my office on a Saturday, and they composed their differences and agreed upon the payments to be made as alimony and agreed upon the custody of the child, and he agreed not further to contest the case.

Thereupon I filed the second amended complaint in which I deleted the charges as to adultery and charged only extreme and repeated cruelty on two occasions to simplify the proof.

Q. Is that in accordance with policy in the State of Illinois?

A. Yes, in accordance with general practice.

(Testimony of A. C. Lewis.)

Q. Will you tell me, Mr. Lewis, about this meeting in your office, you said on a Saturday? Who was at that meeting?

The Court: What difference does it make? The only thing I am interested in in this complaint is whether or not there was a property settlement agreement, and if there was, what reference, if any, it had to the co-partnership.

Mr. Altman: That is the question, your Honor.

The Court: Maybe the co-partnership was all over by this time. [137]

Mr. Altman: That is the question, your Honor. I want to bring out what the plaintiff here really had in her mind, because there she was in an actual meeting.

The Court: May I ask the witness, was there a property settlement in this case?

The Witness: Yes, sir.

The Court: Was it reduced to writing?

The Witness: No, I think it was not.

The Court: It was not approved by the court?

The Witness: No, sir. It wasn't shown to the court.

The Court: If there is an objection, I will sustain the objection, because unless the court passed upon the property settlement agreement, I don't think the agreement of the parties can preclude the government from proceeding along its theory.

Mr. Altman: My purpose is not to show the agreement, your Honor, but, rather, to show the facts and the claims that were made by this plain-

(Testimony of A. C. Lewis.)

tiff, the actual claims she made and knew she was making.

The Court: Do you have an objection?

Mr. Messer: I have an objection.

The Court: Sustained.

Mr. Messer: And I can give the grounds.

Mr. Altman: May I put it this way, your Honor. [138] There has been an attempt to bind this plaintiff, although I, of course, don't believe she could be bound by it, but an attempt to bind her by certain statements and allegations made in certain complaints. We don't know what happened to those complaints. I think we should know. We should know not simply what was in the formal papers that were filed, but what was actually done and what was in her mind.

The Court: I think the objection on hearsay is good. The government wasn't present. They won't be bound by those statements.

Mr. Altman: This is a part of the *res gestae* in this case.

The Court: I will sustain the objection, so you just go ahead and proceed. I don't want to waste any more time on this line because I don't think it is material at all.

Q. (By Mr. Altman): Mr. Lewis, did Mrs. Borin, now Mrs. Morse, ever make any statement or representation to you relating to an interest in a partnership? A. Never. [139] * * * * *

Mr. Altman: Your Honor, Mr. Lewis has already testified that he handled the payments.

(Testimony of A. C. Lewis.)

The Court: I don't think it makes any difference, counsel. If there had been a property settlement agreement, a formal property settlement agreement entered into between these parties, and if it had anything to do with the so-called partnership, I would admit it in evidence, but I can't admit in evidence the oral testimony of a party as to what his impressions were. I don't know whether they came to any agreement or not.

Q. (By Mr. Altman): Mr. Lewis, did the parties come to an agreement at your office at that time after the filing of the amended complaint?

The Court: Same ruling. I think this is entirely immaterial, counsel.

Q. (By Mr. Altman): May I ask this, Mr. Lewis? Did the closing of all the litigation pass through your hands, the litigation between Mrs. Morse and Mr. Borin?

Mr. Messer: I object to that, all the litigation. I don't know whether he would be acquainted with that.

The Court: There is still some litigation in the Tax Court.

Mr. Altman: I am referring to the litigation between Mrs. Morse and her former husband.

The Court: What difference does it make? Are you [140] trying to establish the fact that there was no partnership because Mrs. Borin didn't tell her attorney anything about this partnership?

Mr. Altman: So far there has been an attempt to bind her by what appears in certain papers.

(Testimony of A. C. Lewis.)

The Court: If this witness can testify as to the incorrectness of any document that has been introduced here, I will be glad to hear the witness, but we have documents here in which Mrs. Morse has said there was a partnership, agreed there was a partnership.

Q. (By Mr. Altman): Mr. Lewis, after you filed this second amended complaint, did you hear anything about a partnership?

A. Yes. Subsequently I did.

Q. What statements were made to you as to that, or were any statements made to you as to whether that was in truth and in fact a bona fide partnership?

Mr. Messer: I object to that.

The Court: Sustained. It is objectionable on the ground it is hearsay. The government wasn't participating in any way in those conversations, and unless you can establish that they were—— [141]

* * * * *

The Court: I am satisfied, Mr. Altman, that Mr. Borin treated this partnership as his own business. He didn't ask his wife anything about it. He didn't pay her any dividends. He didn't give her anything. She didn't get anything [142] out of it. I am satisfied of that, but that is not the problem here. The problem is, was she entitled to anything? She could have filed an action at any time, I suppose, to terminate the partnership agreement and have her pro rata part of the assets. [143] * * * * *

(Testimony of A. C. Lewis.)

Direct Examination—(Continued)

Q. (By Mr. Altman): Mr. Lewis, is it a permitted practice in the Illinois courts for an attorney to verify a pleading without the signature of either of the parties litigant?

Mr. Messer: I object. [149]

The Court: Sustained. You have got a document here that has been signed, and I think before a notary public. Now you want to say she didn't do it.

Mr. Altman: No, your Honor. I am referring to this abstract of record, which doesn't show. Counsel yesterday especially referred to pages 2 and 3 of that abstract. I have looked over it very carefully. I am unable to find even a statement it was verified. I may have an incorrect copy, but I fail to find even a statement that the complaint was verified or by whom it was signed.

The Court: What difference does it make? I don't think it makes any difference whether it was customary practice or not. The record shows we have a complaint here. We have a copy of the complaint which shows that a complaint was signed and verified.

Mr. Altman: It doesn't say verified.

The Court: I don't care about that. You are talking about the divorce proceeding.

Mr. Altman: I am talking about this abstract record, pages 2 and 3, the part to which counsel yesterday directed our attention.

The Court: I don't think divorce proceedings

(Testimony of A. C. Lewis.)

have anything to do with this case. I read the three Illinois cases. I don't think the cases have any place in this record at all. There is one issue here, whether or not there was [150] a partnership and whether or not she was a member of that partnership.

She could have been a member of the partnership either by signing the articles of partnership or by her subsequent actions.

Mr. Altman: Yes, your Honor. That is the reason I refer to pages 2 and 3 of this document, which do refer to a partnership.

The Court: Let me see your document.

Mr. Altman: I have a copy of what you have there. It is pages 2 and 3.

The Court: My ruling still stands.

Mr. Altman: At this time, your Honor, I would like to move then, if I may—I will withdraw that.

* * * * *

The Court: I don't know. We haven't got anything here to show the question has been decided. If you can show me a court that has ruled that there was no partnership, I will be glad to follow the ruling of that court. You have got a court of record there, but you haven't got anything before me yet to indicate any court ever passed upon the [151] question of the partnership.

* * * * *

Mr. Altman: This decree in the case of Borin vs. Borin, 45 S. 5229, contains a complete statement of facts and it doesn't show anything about

(Testimony of A. C. Lewis.)

a partnership. It contains a complete statement of the facts of the findings of the court in this case and goes further. It shows the income——

The Court: Don't tell me what it shows. I will look at it myself and see. I wanted counsel to take a look at it.

* * * * *

The Court: This is the divorce proceeding.

Mr. Altman: It is in the divorce proceeding, yes, your Honor. It is in the very proceeding concerning which there is that abstract of record.

The Court: Well, this court doesn't make a finding that there is no partnership agreement. [152]

Mr. Altman: But it does make findings that Mr. Borin had income from the partnership, gives the years, and then it says that Mrs. Borin had no funds, was entirely without funds or means.

The Court: Is there an objection?

Mr. Messer: Yes, there is.

The Court: Objection sustained.

* * * * *

Mr. Altman: And may the record show where reference was made to a copy of a letter dated March 13, 1951, addressed to Mrs. Claire B. Buchman, that the reference was to Plaintiff's Exhibit for identification No. 13.

The Court: The record may so show.

The Clerk: 13 for identification. [153]

* * * * *

The Court: The facts in this case indicate that these papers were looked at by an accountant.

They were looked at by an attorney. Both of them came to the conclusion there was a partnership and, not only that, but she signed, she verified a complaint for the revocation of the partnership and for an accounting. Not only that, but she has admitted to the government on numerous occasions that [154] there was a partnership here.

I don't know how she is going to avoid it. I feel sorry for her. If I was deciding this thing in the first instance, I am rather doubtful I would find there is a partnership. * * * * *

But, however, even though there may not be a partnership, the plaintiff here, the taxpayer, assumed there was a partnership, acted as if there was a partnership. * * * * *

The Court: I would not find that the plaintiff in this action was bound by the partnership agreement under the evidence before me unless it had been for her actions after the date of the agreement. [155]

* * * * *

The Court: What are you going to do with the opinion of the attorney who filed—let me see that exhibit, the photostatic copy of the complaint for the dissolution of the partnership. What are you going to do with the attorney in the case of Borin vs. Borin, filed in the Circuit Court of Cook County, which is signed by her and verified by her? She didn't do that herself. She had to have an attorney. [156]

* * * * *

CLAIRE B. MORSE

recalled as a witness herein, having been heretofore duly sworn, was examined and testified further as follows:

The Clerk: Mrs. Morse, you have heretofore been sworn so you are still under oath. You may be seated.

Redirect Examination

Q. (By Mr. Altman): Mrs. Morse, prior to 1943, did your husband, Mr. Borin, pay your personal living expenses? A. Yes.

Q. Household expenses? A. Yes.

Q. Did he continue to do that in 1943 and thereafter?

Mr. Messer: I object to this line. It all comes back to the divorce proceeding which has helped us not at all. It is immaterial.

The Court: Sustained. I don't know what difference it makes.

Mr. Altman: Your Honor, I come again to the criteria of the existence of a partnership as shown by these cases of the United States Supreme Court.

The Court: Objection sustained.

Q. (By Mr. Altman): Mrs. Morse, did any representatives of the government ever discuss the partnership with you? [158] A. Yes.

Q. What did they tell you about the partnership? Just a minute. I will withdraw that.

Who was present at that time?

A. Mr. Weeden of Chicago.

Mr. Messer: At which time?

(Testimony of Claire B. Morse.)

Mr. Altman: At the time the agents of the government discussed the partnership with her.

Mr. Messer: I don't see that that has any bearing here at all.

The Court: On what theory are you presenting this? Are you trying to show estoppel?

Mr. Altman: Your Honor stated yesterday, when I tried to bring out statements that had been made by others, that the partnership was a phony. Your Honor stated if that was said by the government agents, that would be different. That is exactly what I am trying to do here. I am trying to show by this witness that the government agents themselves said to her and told her again——

The Court: Who was the government agent?

Mr. Altman: That is what I am asking her.

The Witness: Mr. Weeden of Chicago, Internal Revenue.

The Court: What post did he hold?

The Witness: Well, he was on this Borin case.

The Court: Was he a Deputy Collector? Was he in the Agent's office, or in the——

The Witness: I don't know, your Honor, except they called me for an appointment to interview me, at Mr. Joe Rosenthal's office. I can't remember the name of the other man but I think it was Mr. Malik. I think it was someone—it was both of them. They had told me that they definitely were of the opinion that the entire partnership was a dummy set-up and that it was for the pur-

(Testimony of Claire B. Morse.)

pose of—it was Nathan Borin's purpose to do this to evade taxes. [160]

* * * * *

Q. (By Mr. Altman): Mrs. Morse, did you ever render any service to the partnership?

A. No, sir. [167]

* * * * *

Recross Examination * * * * *

Q. (By Mr. Messer): Mrs. Morse, I show you a document marked for identification W, entitled Form 843, and headed Claim to be Filed with the Collector where Assessment was made or Tax Paid. I ask you to look at that document, and particularly at the signature at the bottom thereof. Is that your signature? A. Yes.

Q. Did you sign that? A. Yes.

Q. Did you read the sentence just above that when you signed it? A. What sentence?

Q. Did you read the sentence just above there?

A. No.

Q. You didn't read it?

A. I just signed it. I never read any of those. I signed them for my husband, too.

Q. Did you know the content of this document at the time you signed it? A. No.

Q. I show you a document marked X for identification, [170] headed Form 843, claim for the period January 1, 1945, to December 31, 1945. Is that your signature?

A. But these were sent to me blank. That is

(Testimony of Claire B. Morse.)

my signature. I don't remember reading anything or seeing any of the figures.

Q. Are you testifying that these papers also were sent to you in blank and you signed it?

A. Yes.

Q. You never read the contents?

A. Yes, that is what I say.

Q. And you swore under oath everything was true?

A. I had faith in my attorneys or accountants, or whoever sent them to me at the time.

Q. Is that your signature? A. Yes, sir.

Q. And you signed this document?

A. Yes, sir.

Q. I show you another document marked Y for identification, headed Form 843, Claim. Is that your signature? A. Yes.

Q. You signed that document? A. Yes.

Q. Was it also in blank when you signed it?

A. Everything. I just left everything to Mr. Rosenthal and my accountant. [171]

Mr. Messer: At this time I offer these claims in evidence.

The Court: They may be received in evidence.

Mr. Altman: No objection.

The Clerk: W, X, and Y in evidence.

* * * * *

Q. (By Mr. Messer): Mrs. Morse, the first document I showed you, the first sentence states, "The income on which claimant paid income taxes

(Testimony of Claire B. Morse.)

in the amount of \$24,596.39 for the taxable year 1945, consisted"—and so forth.

Is that a true statement?

A. I don't know. I have never seen any of this.

Q. Is that a true statement? Did you pay those taxes?

A. I don't know. I don't know anything about any of this.

Q. Do you understand what this document is at this time? Claim for refund? Was it ever explained to you after it was filled in?

A. I never was concerned about those things. I was glad to be free and glad to have peace, and I left everything to my accountants and my late husband. I didn't know anything about these things.

Q. Who presented these documents to you in blank for [172] signature?

A. Mr. Rosenthal would mail them to me.

Q. Did he ever explain what the purpose was?

A. No. He might have explained them to Mr. Buchman, but not to me. I just signed them.

Q. Mrs. Morse, I will ask you one question. I believe you stated that you never paid the taxes involved in the year 1944 or the year 1945. Do you feel if you did not pay the taxes you are entitled to a refund of those taxes?

The Court: Objection sustained. It doesn't make any difference what she feels.

Q. (By Mr. Messer): Put it this way. Do you

(Testimony of Claire B. Morse.)

know whether or not any of those taxes shown were ever paid?

A. I can't say. I don't know. I just don't know.

Mr. Altman: Your Honor, I wonder if counsel will stipulate with me that we several times offered to close this case without collection of any of those moneys.

The Court: What difference does it make?

Mr. Messer: What?

Mr. Altman: I mean if her honesty is being impugned here without——

The Court: I don't think her honesty is impugned. She has indicated by her own testimony she doesn't know anything about this transaction. I don't think she knows anything [173] about the transaction. However, that doesn't absolve her from liability. If she relies upon the integrity of her accountant or her attorney, she can't later come in and say she is not bound.

* * * * *

Mr. Altman: I would again, if I may, attempt to introduce this plaintiff's exhibit for identification. I think it is this one right here, No. 12, your Honor. I offer that for the reason that it is an adjudication by an Illinois court making findings of fact as to what means Mrs. Morse had and what distributions Mr. Borin under the name of the partnership made, because these are pertinent to a [174] determination as to whether this part-

nership was in fact just a sham under the cases pertinent in that connection.

Mr. Messer: I object.

The Court: If that is another motion for the introduction of that document in evidence, the motion is denied. [174a]

* * * * *

Mr. Altman: I will offer in evidence Plaintiff's Exhibit 2 for identification, being a letter from the Treasury Department to Mrs. Claire Borin dated June 3, 1948.

Mr. Messer: I object to the introduction of that letter, your Honor, since it concerns the years 1940 and 1941 of the corporation, and that is not in issue.

The Court: Overruled. It may be received in evidence.

The Clerk: Exhibit 2 in evidence.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 2.)

Mr. Altman: I will offer Plaintiff's Exhibit for identification No. 3. Any objection?

Mr. Messer: I object again. That is the years 1940 and '41. We are not concerned with those at all.

The Court: Overruled. It may be received in evidence. [177]

* * * * *

Mr. Altman: No. 12. I will again offer that in evidence, being the exemplified copy of a decree of the Court of Cook County in Chancery, Illinois,

in case No. 45 S 5229, Claire B. Borin vs. Nathan Borin.

Mr. Messer: I object to it.

The Court: Sustain the objection.

Mr. Altman: I will again offer Plaintiff's Exhibit No. 13 for identification, being a copy of a letter dated March 13, 1951, to Mrs. Claire B. Buchman.

Mr. Messer: Object.

The Court: I will sustain the objection.

* * * * *

Mr. Messer: The government offers in evidence exhibits marked for identification A through O.

Mr. Altman: I am going to object to all of them, your Honor. May I state my grounds?

The Court: Yes.

Mr. Altman: As to all of them, I want to state that they are immaterial and irrelevant. They consist, all except two, and I will refer again to those two, of consents to an extension of the statute of limitations. I see no pertinence to this proceeding of the mere fact that Mrs. [179] Morse on being approached for tax would sign a consent to extend the statute so that the government may give the matter further consideration.

The Court: Objection overruled. They may be admitted in evidence.

Mr. Altman: As to those two, one is marked L and the other M, which are different from the others, being entitled transferee agreements, I will also object on the ground that they are immaterial and irrelevant. They show that Mrs. Morse agreed

to be treated as a transferee to the extent of her liability as transferee under the Internal Revenue Code.

As far as I can see, that is no agreement at all.

The Court: Objection overruled. They may be received in evidence.

The Clerk: Government's A through O in evidence.

(The exhibits referred to were received in evidence and marked Government's Exhibits A through O.)

The Clerk: P, Q, R, S, T, U, and V are in evidence.

Mr. Messer: Yes, your Honor.

We will offer Exhibit T which was marked for identification.

Mr. Altman: I will object to that on the ground that while Mrs. Morse identified her signature on the last [180] two pages, there is no indication that any of the other pages are the same as those that were before her when she signed. There is also nothing to show that this was ever filed in court.

The Court: Objection overruled. It may be received in evidence.

The Clerk: Government's Exhibit T.

(The exhibit referred to was received in evidence and marked as Government's Exhibit T.)

Mr. Messer: Next the government offers in evidence Plaintiff's Exhibit marked 8 for identification, offers it as a government exhibit.

Mr. Altman: I will object to that on the ground

that we have not been allowed to show the circumstances under which that was signed, to show that actually there was misrepresentation to her, and that it was represented to her, and I am referring only to the first page of that exhibit, it was represented to her as a mere extension of time, and we were not allowed to put that fact in evidence.

The Court: Objection overruled. It may be received in evidence as Exhibit Z.

The Clerk: Government's Exhibit Z in evidence.

(The exhibit referred to was received in evidence and marked as Government's Exhibit Z.)

* * * * * [181]

The Court: I will further find she did not sign the so-called partnership agreement or did not authorize anybody to sign it for her, but that subsequent to the signing of the partnership agreement she recognized the partnership agreement, and became obligated thereunder.

As a part of the recognition of the partnership agreement, she signed a complaint for dissolution of the partnership and accounting which was verified on the 8th day of February, 1946, and in that complaint she sets out the partnership agreement and that it existed, and in the complaint she says that on or about the first day of May, 1943, the defendant Borin, that is Nathan Borin, and plaintiff, that is Claire Borin, the plaintiff in this action, and certain other individuals entered into a certain partnership agreement, that said agreement was duly recorded, and so forth and so on.

Also in certain papers that she filed with the

Internal Revenue Department, she sets forth that she was a limited partner, and not only that, but she filed claim for refund as a limited partner.

It seems to me that Mrs. Borin is now estopped [184] from denying the partnership, although if it hadn't been for her subsequent acts and conduct, I would feel she was not liable, but I am basing my opinion purely on the actions of Mrs. Borin.

* * * * *

The Court: I feel sorry for Mrs. Borin because I don't think she knew what was going on. I am satisfied that she signed a lot of papers in blank for her accountant or for her attorney, but anybody that signs an application or a paper in blank can't later be heard to complain that she is not responsible.

I would like the findings to contain the express finding that I am finding Mrs. Borin liable because of her conduct subsequent to the first day of May, 1943. I think because of her conduct she is now estopped from denying that there was a partnership.

Now, counsel, if you think that you have any authorities relative to this question of estoppel or the question of the imposition of liability upon Mrs. Borin because of her actions after the first day of May, 1943, I would be very glad to read your authorities.

My sympathy is with Mrs. Borin. I think she is [185] being called upon to pay a tax on something she didn't get.

* * * * *

The Court: Under the authority of *Neil vs. United States*, which I decided in this court, although I think the equities are in favor of Mrs. Borin and she is being called upon to pay a tax here upon property she didn't actually receive, nevertheless, as counsel for the government pointed out, she had a right at any time after the first day of May, 1943 to demand her pro rata share and to demand a dissolution of the partnership. [186]

* * * * *

The Court: Well, you argue it with the Circuit. I would like to see the Circuit reverse me in this case from an equitable standpoint, because I think it is unfair, although I am quite sure the government attorneys will not agree with me, I think it is unfair to require taxpayers to pay a tax upon something they don't get on the theory that they could have got it or might have got it.

Mr. Altman: Your Honor has already found she did not receive anything. If she did not receive anything, I don't see under the cases what basis there could be for transferee liability. Let me point out to your Honor the transferee liability is limited to the assets received as a distributee of the corporation.

The Court: If you have got a case that says it is limited to the assets received, I would be happy to read it. [187] But I think you will find it is not a question of the assets received, but the assets she might have received or could have received.

* * * * *

The Court: No, I won't go any further than

the partnership agreement says. Here was an assignment made from [188] the corporation to the partnership. The corporation is liquidated. She had 10 per cent of the corporation assets. They gave her 10 per cent of the partnership assets. She was entitled to her 10 per cent. If she didn't demand her 10 per cent or she didn't get her 10 per cent, that is her fault. As far as I know, the 10 per cent may still be there. This partnership may still be in existence. It may still have some assets. I don't know.

* * * * *

The Court: You agree with me, do you not, even though one does not sign a contract, nevertheless he can be bound under the contract because of his subsequent acts?

Mr. Harpole: If he accepts the benefits, I think so, yes.

The Court: Don't predicate it upon accepting the benefits, because I am going to find she didn't get any benefits. [189]

* * * * *

The Court: Mr. Altman, in the past eight years I have decided a number of law cases upon equity, and the Circuit tells me I shouldn't do equity, that I should follow the law. I think the equity is in favor of your client. [190]

* * * * *

[Endorsed]: Filed March 27, 1958.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Monday, February 3, 1958, 10 A.M.

* * * * *

Mr. Altman: Your Honor, I was a little chagrined after I read the transcript and compared it with notes of mine of what I intended to do at a certain point. I found it was not there.

What I had in mind was this. I am referring to pages 149 to 151 of the transcript, beginning at the bottom of 149, line 21. There I was laying a foundation for a motion to withdraw Defendant's Exhibit U from the evidence, and then apparently when I got down to page 151 I somehow got diverted from that and didn't make my motion.

The Court: Let me ask you a question? Why do you want to withdraw Exhibit U? On what theory? Is it immaterial?

Mr. Altman: Well, that it is hearsay primarily, your Honor, and also it is immaterial.

The Court: Well, if it is immaterial, the Circuit Court will ignore it, won't it? I ignored it. If it is [3] immaterial, I ignored it. I didn't pay any attention to it. If it is immaterial, what difference does it make?

Mr. Altman: In that case, if your Honor finds it is immaterial, why, I have no complaint.

The Court: I didn't predicate my judgment upon that exhibit at all.

Mr. Altman: Upon Exhibit U?

The Court: No.

Mr. Altman: Well, I think that is about it, then, your Honor.

The Court: Where we have a case tried without a jury, if any evidence is admitted inadvertently that is immaterial, I usually disregard it. If there isn't something else in the record to sustain the finding, why, I wouldn't make the finding. But I think from all the testimony that has been introduced here that the court's finding that the plaintiff had an interest in the corporation, that the assets were turned over to the partnership, and she had an interest in the partnership, I think there is plenty of evidence to sustain the finding without that exhibit.

Mr. Altman: Without Exhibit U?

The Court: I think so. [4]

* * * * *

The Court: But the fact of the matter is that I considered the record in those divorce cases as immaterial, because it was not in the divorce case alone that she set up that she had an interest in this partnership. She filed an independent action.

Mr. Altman: I understand that, your Honor.

The Court: That is what I predicated my finding on.

Mr. Altman: In other words, your conclusion was based on Defendant's Exhibit T, the independent action.

The Court: Well, I don't know about that. It was based on that plus other evidence.

Mr. Messer: Yes, sir, there is other evidence.

The Court: But not solely upon that.

Mr. Altman: May I inquire, your Honor, whether it was in any part based on the recitals in the partnership agreement?

The Court: No. The only thing that I say to you [5] is that I did not consider in any way any of the evidence that was admitted relative to the divorce action that was filed and then taken to the upper courts.

Mr. Altman: What I was just referring to, your Honor, was the recitals in Exhibit U. No, it isn't that. Strike that. The recitals in Plaintiff's Exhibit 1, that is the partnership agreement. There was a recital in there and, of course, we didn't introduce it for the purpose of——

The Court: I found specifically she hadn't signed that partnership agreement.

Mr. Altman: Yes.

The Court: I am predicating my judgment upon one theory only, and I wish it to go up on that theory.

Mr. Altman: Yes.

The Court: That is, here was a partnership agreement that she didn't sign.

Mr. Altman: Yes.

The Court: She didn't get anything under the partnership agreement except a claim that she possibly could have collected upon.

Mr. Altman: Yes.

The Court: However, afterwards she set up that there was a partnership agreement, that she was a partner, and she brought an action to terminate the partnership agreement and for an accounting.

Now, I say she was estopped [6] from denying the partnership. [7]

* * * * *

Mr. Messer: That was in the agreement. However, in the partnership where each of their proportionate shares in the corporation—the shares in the corporation, which she acquired, by the way, she may not have had knowledge of at the time, but she acquired prior to the dissolution of the corporation as part of the scheme for dissolution of the corporation and creating the partnership. She acquired 80 shares of stock, which she alleged she owned at the time she filed suit for divorce. Then from the 80 shares of stock she acquired a 10 per cent interest in the partnership which was later formed and which is laid out in Exhibit 1, Plaintiff's Exhibit 1.

Then later she attempted to dissolve the partnership and have an accounting, alleging she had this 10 per cent interest, which she acquired through the 80 shares of stock in the corporation, whose assets were all transferred to the partnership upon dissolution of the corporation. [8]

* * * * *

The Court: May I inquire, have you any evidence that the shares of stock were actually issued to the plaintiff?

Mr. Messer: I don't think there is now, your Honor, because all the records were destroyed in the fire that they had. We have to go by other evidence as to what her interests were. The records were destroyed at a time years ago when the cor-

poration records were destroyed at that time. All the records were destroyed. * * * * * [9]

The Court: But I think you have got to establish first she had an interest in the corporation. I thought there wasn't any question about her having an interest in the corporation.

Mr. Messer: It has been stipulated the corporation was dissolved and all the assets of the corporation went into the partnership.

Mr. Altman: That is correct, your Honor.

The Court: I know about that.

Mr. Messer: It is also in Exhibit 1, which you say she ratified and adopted as her own. It sets out there the interest of each that they had. [11]

* * * * *

[Endorsed]: Filed March 27, 1958.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

February 17, 1958, 2:00 O'Clock, P.M.

* * * * *

The Court: Well, I have been going over the findings and judgment presented by the government, and also the objections or the proposed findings as filed by the plaintiff and defendant in intervention.

The last time we were here counsel for plaintiff and defendant in intervention said there was a question whether or not Claire Boren was the owner of 80 shares of stock of the Boren Art Products Corporation. I will refer you to page 182 of the

transcript, which came at the end of the case, and I said: "I will make a finding in this case, and I wish the attorneys would keep track of what I am finding so that they can incorporate them in the written findings—I will make a finding in this case that Claire Boren was the owner of 80 shares of stock of Boren Art Products Corporation."

I have gone over the entire file and all the exhibits and I am satisfied there is enough evidence in the record to sustain that finding. [2]

Also, I set forth that I wanted the government to incorporate in the formal findings that were filed my findings. I have gone over the findings as lodged by the government and I can't find anything wrong with them, because I think that they are in accordance with my oral statement at the conclusion of the trial.

* * * * *

The Court: Mr. Altman, I don't want to discuss with you the evidence in this case. At the conclusion of the case after hearing the testimony, when the case was fresh in my mind, I made a finding that Mrs. Boren was the owner of 80 shares of stock. I have gone back over the record. I have read the exhibits. I have read the contract. I am satisfied with that finding. [3]

* * * * *

The Court: At the time of the trial we argued this case. We argued it the last time. After the last hearing, I reread the entire transcript, and I read it once before. In the meantime I have read the entire transcript again to determine

whether or not in my opinion there was sufficient evidence there to justify my finding that Mrs. Boren owned 10 per cent of the stock of the corporation. I feel sorry for her. I would like to hold for her. But I just can't do that.

* * * * *

The Court: I am sorry. You argue it before the Circuit. I am going to deny your motion relative to the striking of certain exhibits. They were introduced in evidence in this case and they are a part of this case, and the court came to its conclusion from all the evidence introduced in the case, not from part of it, but all of it. Your motion is denied. I have signed the findings of fact and conclusions of law. * * * * [5]

[Endorsed]: Filed March 19, 1958.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Monday, March 3, 1958, 10:00 A.M.

* * * * *

Mr. Altman: If your Honor will take a look at pages 149 and 150 of the transcript, you will notice that when we came back for trial the next day, I attempted to lay a foundation [2] for striking Exhibit U. I had in the meantime read it through very carefully, and I began to lay the grounds, the foundation for striking that exhibit.

Then while I was in the process of that, your Honor stated that this was just one of the divorce proceedings, the exhibit that I referred to, and

that you considered all these divorce proceedings immaterial.

Then the next statement, your Honor, you will notice in the middle of page 151, I was about to make a motion there. My motion was to strike the exhibit, but realizing that your Honor had stated that the exhibit was immaterial, I came to the conclusion that my motion was unnecessary, that actually in effect Exhibit U was no longer a part of the evidence. Realizing that, I proceeded thereafter on that basis. [3]

* * * * *

[Endorsed]: Filed March 27, 1958.

PLAINTIFF'S EXHIBIT No. 1

* * * * *

AGREEMENT

This Agreement, made and entered into this 1st day of May, 1943, by and between Nathan Borin, party of the First Part, and all such persons hereinafter designated Limited Partners whose names are set out hereinafter under the designation of "Limited Partners", parties of the Second Part, all of Chicago, Cook County, Illinois.

Whereas, the said First and Second parties (as will more fully hereafter appear), were the sole holders of shares of stock of Borin Art Products Corporation, (an Illinois corporation, doing business and having its principal place of business in the Town of Cicero, Illinois), and that said parties held shares of stock in the amounts set opposite their names.

Plaintiff's Exhibit No. 1—(Continued)

| Name of Shareholder | Number of Shares |
|--|------------------|
| Nathan Borin | 80 |
| Claire Borin | 80 |
| L. V. Locker | 40 |
| Joseph Levinson | 40 |
| Harold Hoffman | 40 |
| Martin Kedzior | 25 |
| E. J. Ruzak | 25 |
| Simon Herr | 30 |
| Isadore Weinert | 15 |
| Milton Kessler | 15 |
| Lester Witte | 50 |
| Sarah Levin | 40 |
| Sam Borin | 40 |
| Mark Winston, Trustee for Bonny Joy Borin and Daniel Borin and Charles Borin | 120 |
| S. J. Weiss | 40 |
| Ida Borin | 60 |
| Edith Krolík | 60 |

Whereas, it was considered to be in the best interest of all of the shareholders of said corporation to dissolve said corporation and continue the operation of the business of said corporation as a Limited Partnership having first party hereto act as General Partner and the said second parties to be Limited Partners; and,

Whereas, with that object in view, the aforementioned corporation is being dissolved pursuant to the laws of the State of Illinois; and,

Plaintiff's Exhibit No. 1—(Continued)

Whereas, upon dissolution of the aforementioned shareholders of said corporation will become entitled to proportions of the property of said corporation or the proceeds thereof after payment of all just debts to the extent that their stockholders bear to the entire issuance of stock.

Now, Therefore, the parties hereto mutually agree to become partners in the business of Borin Art Products Company for the period and upon the terms following, to-wit:

(1) The name of said partnership shall be Borin Art Products Company.

(2) The character of the business shall be manufacturing, buying and selling and generally dealing in all kinds of goods, wares and merchandise, household utilities, picture frames, mirrors, novelties and sundry items.

(3) The location of the principal place of business is in the Town of Cicero, County of Cook, Illinois.

(4) That the name and place of residence of each member General and Limited Partner being respectively designated, are as follows:

General Partner
Nathan Borin

Address
4300 Lake Shore Drive

Limited Partners
Claire Borin
L. V. Locker
Joseph Levinson
Harold Hoffman
Martin Kedzior
E. J. Ruzak

4300 Lake Shore Drive
2744 Winnemac Avenue
1860 S. Karlov Avenue
4949 N. Ridgeway Avenue
2223 Cortland Avenue
3120 S. Kedvale Avenue

Plaintiff's Exhibit No. 1—(Continued)

| Limited Partners | Address |
|--|-----------------------------|
| Simon Herr | 518 Roscoe Street |
| Isadore Weinert | 4818 N. Bernard Avenue |
| Milton Kessler | 1852 S. Central Park Avenue |
| Lester Witte | 134 S. LaSalle Street |
| Sarah Levin | 5404 Drexel Blvd. |
| Sam Borin | 5101 Drexel Blvd. |
| Mark Winston, Trustee for Bonny Joy Borin, Charles Borin (son) and Daniel Borin | 609 Stratford Place |
| S. J. Weiss | 3624 Franklin Blvd. |
| Ida Borin | 5101 Drexel Blvd., |
| Edith Krolik | 3255 Eastwood Avenue |

(5) The term for which the partnership is to exist is the period of one year commencing the 1st day of May 1943 and ending April 30, 1944, and thereafter from year to year unless at least six (6) calendar months before April 30th of any year, General Partner shall have delivered to the office of the partnership a written notice that he desires to terminate the partnership at the close of business on April 30th of the succeeding year, in which event the partnership shall terminate at the time so designated.

(6) That the amount of cash and a description of, and the agreed value of the property contributed by each Limited Partner is as follows:

General Partner:

Nathan Borin—Amount Contributed: 10% of assets of Borin Art Products Corporation of the agreed value of \$12,000.

Plaintiff's Exhibit No. 1—(Continued)

Limited Partners:

Claire Borin—Amount Contributed: 10% of company assets of the agreed value of \$12,000.

Harold Hoffman — Amount Contributed: 5% of company assets of the agreed value of \$6,000.

L. V. Locker—Amount Contributed: 5% of company assets of the agreed value of \$6,000.

Joseph Levinson — Amount Contributed: 5% of company assets of the agreed value of \$6,000.

Martin Kedzior—Amount Contributed: $31\frac{1}{8}\%$ of company assets of the agreed value of \$3,750.

E. J. Ruzak—Amount Contributed: $31\frac{1}{8}\%$ of company assets of the agreed value of \$3,750.

Simon Herr — Amount Contributed: $3-6\frac{8}{8}\%$ of company assets of the agreed value of \$4,500.

Isadore Weinert—Amount Contributed: $17\frac{1}{8}\%$ of company assets of the agreed value of \$2,250.

Milton Kessler—Amount Contributed: $17\frac{1}{8}\%$ of company assets of the agreed value of \$2,250.

Lester Witte — Amount Contributed: $6-2\frac{8}{8}\%$ of company assets of the agreed value of \$7,500.

Sarah Levin—Amount Contributed: 5% of company assets of the agreed value of \$6,000.

Sam Borin — Amount Contributed: 5% of company assets of the agreed value of \$6,000.

Mark Winston, Trustee for Bonny Joy Borin, Charles Borin (son) and Daniel Borin — Amount Contributed: 15% of company assets of the agreed value of \$18,000.

S. J. Weiss—Amount Contributed: 5% of company assets of the agreed value of \$6,000.

Plaintiff's Exhibit No. 1—(Continued)

Ida Borin—Amount Contributed: 7½% of company assets of the agreed value of \$9,000.

Edith Krolik—Amount Contributed: 7½% of company assets of the agreed value of \$9,000.

By agreement of all of the parties to this agreement the aforementioned Limited Partners shall share in the profits of said business as follows:

(a) Prior to a just apportionment of the remaining profits, there shall be deducted and paid to the following named persons the amounts set opposite their names.

| Name | Salary |
|-----------------|---------------------------------|
| Nathan Borin | \$30,000.00 |
| Claire Borin | 15,000.00 |
| L. V. Locker | 6,500.00 |
| Joseph Levinson | 6,000.00 |
| Harold Hoffman | 6,000.00 |
| Martin Kedzior | 5,200.00 |
| E. J. Ruzak | 3,900.00 |
| Simon Herr | 2,600.00 |
| Isadore Weinert | 2,990.00 |
| Milton Kessler | 3,120.00 |
| Sarah Levin | 2,600.00 |
| S. J. Weiss | 5,200.00 |
| Sam Borin | Stipulated commission on sales. |

(b) That thereafter, all remaining profits shall be divided between all of the parties hereto so that each shall receive that percentage of the profits which conforms to the share of interest assigned by

Plaintiff's Exhibit No. 1—(Continued)

him to said partnership from the assets of Borin Art Products Corporation.

(7) Said partners have not contributed any additional cash or property to said Limited Partnership.

(8) The time when the contribution of the Limited Partners who have made contribution is to be returned, is at the termination of said partnership.

(9) The share of profits or other compensation by way of income which the said Limited Partners shall receive by reason of his contribution is set out in paragraph 6 above.

It is understood, however, that all of the foregoing charges are limited and conditioned upon each of the foregoing being actively engaged in the services of said Limited Partnership and in case any or either of the aforementioned parties ceases to be so actively engaged, for any reason whatsoever, then the amount set out opposite his name to be paid him prior to a distribution of profits shall be cancelled and annulled and be of no effect. Further provision for the distribution of profits is provided for in other paragraphs of this agreement.

(10) None of the Limited Partners is authorized to substitute an assignee as contributor in his place.

* * * * *

(18) The General Partner shall at all times devote his time and best efforts to the business of the partnership and except as herein otherwise limited, shall have full control, supervision and management thereof, and shall have full right, power and au-

Plaintiff's Exhibit No. 1—(Continued)

thority to discharge, with or without cause, any person employed by said partnership, even though he be an employee having a limited partnership interest therein.

* * * * *

(20) It is further understood and agreed that in any instance where any Limited Partner has become indebted to the General Partner by reason of the purchase of stock of Borin Art Products Corporation, or for any other reason, the said General Partner shall have a lien upon any and all profits payable to the said Limited Partner from said partnership until the sum due said General Partner from said Limited Partner or partners has been paid him.

(21) In the event that employment by the partnership of any of the Limited Partners is terminated for any reason, with or without cause, the partnership shall thereafter have a continuing option and right to re-purchase said Limited Partner's interest in said partnership. In the event said partnership elects to re-purchase the interest of such Limited Partner at any time thereafter, it shall pay therefor the book value thereof as determined by the last previous audit prior to such election. The payment therefor shall be in equal installments extending over a period of eighteen (18) months from the time of such election.

* * * * *

PLAINTIFF'S EXHIBIT No. 12
[For Identification]

Placita—Superior Court of Cook County
(Decree) Form 89
United States of America

State of Illinois,
County of Cook—ss.

Pleas, before the Honorable Donald S. McKinlay, one of the Judges of the Superior Court of Cook County, in the State of Illinois, holding a branch Court of Said Court, at a regular term of said Superior Court of Cook County, begun and holden at the Court House, in the City of Chicago, in said County, and State, on the first Monday, being the sixth day of December, in the year of our Lord one thousand nine hundred and forty-eight and of the Independence of the United States of America, the one hundred and seventy-three.

Present: The Honorable Donald S. McKinlay, Judge of the Superior Court of Cook County, John S. Boyle, State's Attorney, Elmer Michael Walsh, Sheriff of Cook County. Attest: Henry Sonnenschein, Clerk.

Be it remembered that heretofore, to wit: on the 20th day of December in the year of our Lord one thousand nine hundred and forty-eight the same being one of the days of the December Term of the Superior Court of Cook County the following among other proceedings were had in said Court and entered of record, to wit:

Plaintiff's Exhibit No. 12—(Continued)

State of Illinois,
County of Cook—ss.

In the Superior Court of Cook County
In Chancery

No. 45 S 5229

CLAIRE B. BORIN,
Plaintiff and Counter-Defendant,

vs.

NATHAN BORIN,
Defendant and Counter-Claimant.

DECREE

This cause coming on to be heard upon the exceptions of Nathan Borin, defendant and counter-claimant, to the report and supplemental report of William J. McGah, Master in Chancery of this court, upon the evidence and proofs taken by him on the petition of the said Claire B. Borin, plaintiff and counter-defendant, for attorneys' fees and suit money and the amended answer thereto of the said Nathan Borin, together with said Master's conclusions of fact and law thereon; and the court having duly considered said exceptions of Nathan Borin and having heard the arguments of his counsel and counsel for the said Claire B. Borin, and now being fully advised in the premises; Finds:

* * * * *

Plaintiff's Exhibit No. 12—(Continued)

3. That the said Claire B. Borin was by the verdict of the jury and the judgment of this court adjudged not guilty of the charges of adultery and other misconduct made against her by the said Nathan Borin in his counter complaint and amended and supplemental counter complaint in this cause; that the said Claire B. Borin properly and necessarily incurred charges for suit money as follows: (a) in the amount of \$729.90 for stenographic court reporting of the trial of said cause upon the issues raised by the counter complaint and amended and supplemental counter complaint of Nathan Borin; (b) in the amount of \$887.22 for investigating services rendered in preparation of her defense thereto; (c) in the amount of \$525.00 for the services of an attorney in Miami Beach, Florida, to interview prospective witnesses and to investigate the charges made by said Nathan Borin in his said counter complaint and amended and supplemental counter complaint as to acts of adultery therein alleged to have been committed by the said Claire B. Borin in the State of Florida; (d) in the amount of \$76.65 for necessary long distance telephone calls in connection with the defense of the said Claire B. Borin to the charges of adultery and misconduct made against her in said counter complaint and amended and supplemental counter complaint; that each of such amounts aforesaid was a fair, reasonable and the usual and customary charge for the services hereinabove in this paragraph itemized; that the said Claire B. Borin is lawfully entitled to the allow-

Plaintiff's Exhibit No. 12—(Continued)

ance of each of such charges, totalling the sum of \$2,218.77, as and for suit money by her incurred in the above entitled cause in the preparation of her defense and to defend the charges of adultery and other misconduct made by the said Nathan Borin against her in his said counter complaint and amended and supplemental counter complaint.

* * * * *

5. That the said Nathan Borin is the owner of ninety-six percent (96%) of all the capital stock of Limits Industrial Building Corporation, which corporation owns the property and premises commonly known as 1325 South Cicero Avenue, Chicago, Illinois; that the equity or net worth of said corporation in said real estate is now approximately \$235,000.00; that the net income of the said Nathan Borin was in the year 1945 \$69,285.64, in the year 1946 \$75,563.82 and in the year 1947 \$65,911.45; that in addition to said net income the defendant withdrew from Borin Art Products Company, a partnership of which he was general partner, the sum of \$118,120.52 between April 1, 1944 and October 31, 1947;

* * * * *

7. That the said Claire B. Borin had no means with which to employ counsel to represent her nor to prepare her defense to the charges of adultery and other misconduct made against her by the said Nathan Borin in his counter complaint and amended and supplemental counter complaint; and the said Claire B. Borin now has no means to pay for the

Plaintiff's Exhibit No. 12—(Continued)
suit money and attorneys' fees by her incurred as
aforesaid.

* * * * *

Dated: Dec. 20, 1948.

Enter: Donald S. McKinlay,
Judge.

PLAINTIFF'S EXHIBIT No. 13

(For Identification)

(Copy)

March 13, 1951

Mrs. Claire B. Buchman
10518 Wilshire
Los Angeles, California

Dear Claire:

I am enclosing herewith three forms in connection with your pending refund claim before the Department of Internal Revenue, which I wish you would sign and forward in the enclosed envelope at once.

These papers are merely extensions of forms that you have previously signed and extend the Statute of Limitations from June 30th, 1951 to June 30th, 1952. It is important that you take care of this immediately, as Mr. Malik, of the Internal Revenue Bureau, just called me and informed me that unless these forms are in their office within ten days, they will go ahead and make assessment, as they are compelled to do this by law. If, however, the forms are

Plaintiff's Exhibit No. 13—(Continued)

received by them in time, they will then be able to extend the matter, awaiting disposition of Nate Borin's matter.

I trust that Harry is fully recovered and is home from the hospital. I am sorry that I was unable to talk to him again, but at this time of the year I don't know whether I am coming or going. Tell him I hope to talk to him soon.

The above matter is very urgent, Claire, so please do not forget to take care of same at once.

With kindest personal regards, I am

As ever,

JAR'BL

Encl.

P. S. All forms are to be signed on the lines indicated by an "X", as Claire B. Buchman (formerly Claire Borin).

x x x x x

BORIN ART PRODUCTS CO.
1325 SOUTH CICERO AVENUE
CICERO, ILLINOIS

GOVERNMENT'S EXHIBIT "P"

- MAY 1, 1943 - JANUARY 31, 1944

NET INCOME FOR INCOME TAX REPORTING

| <u>PARTNERS</u> | <u>PROPORTION OF CONTRIBUTIONS</u> | <u>TOTAL FOR INCOME TAX REPORTING</u> |
|----------------------------------|------------------------------------|---------------------------------------|
| Nathan Borin | | |
| 4300 Marine Dr. Chicago Ill | \$ 210.85 | \$ 43,489.42 |
| Claire Borin | | |
| 4300 Marine Dr. " " | 210.85 | 32,239.42 |
| L. V. Locker | | |
| 1325 S. Cicero Ave. Cicero, Ill | 105.42 | 20,810.85 x |
| Joseph Levinson | " " 105.43 | 15,839.71 |
| H. Hoffman | " " 105.42 | 15,714.71 |
| M. Kenzior | " " 65.89 | 10,459.19 |
| E. Rusiak | " " 65.89 | 9,484.19 x |
| S. Herr | " " 79.07 | 9,821.03 |
| I. Wement | " " 39.53 | 6,178.02 |
| M. Kessler | " " 39.53 | 6,275.52 x |
| Julia Witte | | |
| 5056 Marine Drive, Chicago Ill. | 131.78 | 13,118.39 |
| S. Levin | | |
| 1325 S. Cicero Ave., Cicero, Ill | 105.42 | 17,047.90 - |
| S. Borin | " " 105.42 | 19,832.36 |
| M. Winston-Trustee | | |
| 1325 S. Cicero Ave. | " " 316.27 | 31,484.14 |
| S. J. Weiss | | |
| 1325 S Cicero Ave. | " " 105.43 | 20,412.14 x |
| I. Borin | | |
| 1325 S Cicero Ave. | " " 158.15 | 20,345.27 |
| E. Krolík | " " 158.15 | 15,742.07 |
| | <u>\$2,108.50</u> | <u>\$308,291.33</u> |

x x x x x

Borin Art Products Co.
1325 So. Cicero Avenue
Chicago 50, Illinois

Year 1/31/45

GOVERNMENT'S EXHIBIT "Q"

Schedule I - Page 4 - Partner's Share of Income & Credits

| Name of Partner | Time Devoted to Business | Address of Partner | Column 2 | Column 9 |
|---|--------------------------|------------------------------|---------------------|--------------|
| | | | Ordinary Net Income | Contribution |
| Nathan Borin | All | 4300 Lake Shore Drive, Chgo. | \$ 61,028.35 | \$ 243.17 |
| Claire Borin — | Part | 4300 Lake Shore Drive, " | 46,028.35 | 243.17 |
| Harold Hoffman | All | 4949 N. Ridgeway Ave., " | 25,106.05 | 121.58 |
| L. V. Locker | All | 2744 Winnemac Avenue, " | 30,338.56 | 121.58 |
| Joseph Levinson | All | 1861 S. Karlov Avenue, " | 25,556.06 | 121.58 |
| Martin Kedzior | All | 1431 Wicker Park Avenue, " | 17,753.26 | 76.11 |
| Simon Herr | Part | 518 Roscoe Street, " | 14,235.63 | 91.19 |
| Isadore Weinert | All | 4818 N. Bernard Avenue, " | 11,664.71 | 45.71 |
| Milton Kessler | In armed forces | 1852 S. Central Park Ave., " | 5,832.84 | 45.71 |
| Julia Witte — | None | 5056 Marine Drive, " | 19,392.73 | 151.99 |
| Sara Levin — | None | 5404 Drexel Blvd., " | 18,114.18 | 121.58 |
| Sam Borin — | All | 5101 Drexel Blvd., " | 31,937.79 | 121.58 |
| Mark Winston - trustee - for Bonny Joy Borin | | | | |
| Charles Borin | | | | |
| Daniel Borin | None | 609 Stratford Place, " | 46,572.59 | 364.93 |
| S. J. Weiss | All | 2163 N. Mozart Avenue, " | 27,217.74 | 121.58 |
| Ida Borin — | None | 5105 Drexel Blvd., " | 23,271.26 | 182.37 |
| Edyth Rosen Krolik | None | 3255 Eastwood Avenue, " | 23,271.26 | 182.37 |
| Totals | | | \$427,321.36 | \$ 2,356.25 |

Year Ended January 31, 1946

GOVERNMENT'S EXHIBIT "R"

Schedule I, Page 4 - Partner's Income

| <u>Name and Address</u> | <u>Col. 2</u> | | <u>Col. 9</u> | |
|--|---------------|-------------------|-----------------|----------------------|
| | <u>Time</u> | <u>Net Income</u> | <u>Ordinary</u> | <u>Contributions</u> |
| Nathan Borin | All | \$ 73,722.09 | \$ | 741.12 |
| Claire Borin | None | 21,534.18 | | - |
| H. Hoffman | All | 16,887.60 | | 184.56 |
| L. V. Locker | All | 17,387.60 | | 184.56 |
| J. Levinson | All | 17,387.60 | | 184.56 |
| M. Kedzior | All | 12,004.75 | | 115.35 |
| I. Weinert | All | 7,072.85 | | 69.21 |
| M. Kessler | All | 7,202.85 | | 69.21 |
| S. Levin | None | 10,887.60 | | 184.56 |
| S. Borin | All | 22,240.28 | | 184.56 |
| M. Winston, Trustee for Bonny Joy Borin for Daniel Borin | | 10,821.82 | | - |
| | | 10,821.82 | | - |
| Chas. Borin | None | 10,997.82 | | 186.42 |
| S. J. Weiss | All | 17,387.60 | | 184.56 |
| I. Borin | None | 16,503.10 | | 279.74 |
| E. Krolik | None | 16,503.10 | | 279.74 |
| Total Schedule I, Page 4 | | \$289,362.66 | | \$2,848.15 |

✓ x ✓ x
 rin Art Products Company
 W. North Bank Drive
 cago 10, Illinois

GOVERNMENT'S EXHIBIT "S"

1065 - 1946 (Amended)

Schedule H - Partners' Capital Accounts

| | E N D | | O F Y E A R | |
|---------------------------------|---------------------|------------------------|---------------------|---------------------|
| Beginning of Year | Original Return | Additional Net Loss | Amended Return | |
| GENERAL PARTNERS | | | | |
| Nathan Borin | \$ 10,181.05 | \$ 85,419.40 | \$ 33,838.68 | \$119,258.00 |
| Samuel Borin | 7,602.61 | 8,463.27 | 8,426.75 | 36.50 |
| Simon J. Weiss | 6,982.74 | 12,586.64 | 8,426.75 | 4,159.80 |
| LIMITED PARTNERS | | | | |
| Sara Levin | 20,570.21 | 30,179.32 | 8,426.75 | 21,752.50 |
| Charles Borin | 30,997.03 | 25,368.45 | 8,512.34 | 16,856.10 |
| Ada Borin | 36,452.72 | 51,197.75 | 12,771.80 | 38,425.90 |
| Edyth Krolik | 20,984.12 | 28,728.79 | 12,771.80 | 15,956.90 |
| Mark Winston, Trustee for: | | | | |
| Bonny Joy Borin | 37,176.28 | 45,771.16 | 8,518.92 | 37,252.20 |
| Daniel Borin | 37,176.28 | 45,771.16 | 8,518.92 | 37,252.20 |
| LIMITED LIMITED PARTNERS | | | | |
| Clair Borin | 11,535.34 | 11,740.47 | - | 11,740.40 |
| Arnold Hoffman | 8,863.54 | 3,804.79 | - | 3,804.70 |
| Ernest V. Locker (deceased) | 9,057.37 | 957.17 | - | 957.10 |
| Joseph Levinson | 10,301.30 | 5,181.30 | - | 5,181.30 |
| Martin Kedzior | 5,715.50 | 2,845.50 | - | 2,845.50 |
| Adore Weinert | 6,748.11 | 5,376.78 | - | 5,376.70 |
| Wilton Kessler | 5,496.89 | 3,879.68 | - | 3,879.60 |
| TOTALS | \$222,408.31 | \$172,951.89 | \$110,212.71 | \$ 62,739.10 |



GOVERNMENT'S EXHIBIT "T"

State of Illinois,
County of Cook—ss.

In the Circuit Court of Cook County
In Chancery

No. 46 C 1685

CLAIRE BORIN

vs.

NATHAN BORIN, L. V. LOCKER, SPRINGFIELD FIRE & MARINE INSURANCE CO., AETNA INSURANCE CO., FIREMAN'S FUND INSURANCE CO., LIVERPOOL & LONDON & GLOBE INSURANCE CO., NORTHERN ASSURANCE CO. OF LONDON, GLENS FALLS INSURANCE CO., HOME INSURANCE CO., UNITED STATES FIRE INSURANCE CO., and UNDERWRITERS SERVICE ASSOCIATION.

COMPLAINT IN CHANCERY FOR DISSOLUTION OF PARTNERSHIP, ACCOUNTING, AND OTHER RELIEF

Plaintiff, Claire Borin, by Lederer, Livingston, Kahn & Adsit, her attorneys, complains of the defendant, Nathan Borin, the defendant, L. V. Locker, and the defendants, Springfield Fire & Marine Insurance Co., Aetna Insurance Co., Fireman's Fund Insurance Co., Liverpool & London & Globe

Government's Exhibit "T"—(Continued)

Insurance Co., Northern Assurance Co. of London, Glens Falls Insurance Co., Home Insurance Co., United States Fire Insurance Co., and Underwriters Service Association and for grounds of said Complaint shows to the Court the following:

(1) That plaintiff and defendant Nathan Borin are residents of the City of Chicago, County of Cook and State of Illinois; that they are husband and wife; that prior to February of 1945 they resided together as husband and wife but since that time they have been living separate and apart and are presently parties to a certain divorce proceeding heretofore filed in the Superior Court of Cook County.

(2) That on or about the first day of May, 1943, the defendant, Borin, and the plaintiff and certain other individuals, including the defendant, Locker, entered into a certain limited partnership agreement; that said agreement was duly recorded in the office of the Recorder of Deeds of Cook County, Illinois, on May 20, 1943, as Document 13078304 in Book 38240 of Records, at page 212; that a copy of said limited partnership agreement is attached hereto, marked Exhibit "A", and by express reference made a part hereof.

(3) That in pursuance of the terms of said Exhibit "A" the defendant Nathan Borin as the general and managing partner of said partnership operated a business known as the Borin Art Products Company from the date of the agreement down to on or about the 10th day of January, 1946, when the

Government's Exhibit "T"—(Continued)

plant of said limited partnership burned to the ground and was totally destroyed.

(4) That during all of the time said partnership was in existence the same was entirely under the control, domination and direction of the defendant Nathan Borin; that the books of account of said partnership were maintained by the defendant Locker who acted as comptroller of said enterprise, but that said Locker made entries in the books of account in pursuance of the instructions and directions of the said defendant Borin and of no other person whatsoever.

(5) That the plaintiff has remained as a limited partner in said enterprise from the commencement date thereof to the present time; that by reason of the facts hereinafter set forth she is no longer considered as a partner by the said defendant Borin; that under date of September 18, 1945, she received from the Borin Art Products Company a letter purporting to terminate plaintiff's interest in said partnership, copy of which letter is attached hereto, marked Exhibit "B", and expressly made a part hereof; that under date of September 21, 1945, plaintiff, through her attorneys, replied to said purported termination and averred therein that the notice of termination was not proper under the terms of the partnership agreement, copy of which said letter, marked Exhibit "C", and attached hereto, is expressly made a part hereof; that in reply thereto plaintiff received a letter bearing date of September 25, 1945, copy of which is attached

Government Exhibit "T"—(Continued)

hereto, marked Exhibit "D", and made a part hereof; that the plaintiff avers and alleges that there has been no proper termination of her interest in the partnership and that therefore she is a partner in pursuance of the terms of the agreement attached hereto as Exhibit "A" until the date of the filing of this Complaint.

(6) Plaintiff further avers that by reason of the conduct of the defendant Nathan Borin, as will be more fully hereinafter alleged, plaintiff desires to withdraw from said partnership as of this date.

(7) Plaintiff further alleges that after the letter attached hereto and marked Exhibit "D" plaintiff endeavored to have accountants retained by her examine the books of the partnership to determine her standing therein and the amount due to her as a result of the partnership operations; that thereafter the defendant furnished to the plaintiff a statement setting forth that as of September 12, 1945, the original capital of the plaintiff in said partnership, plus her profit and salary, amounted to \$120,864.33, and that her alleged withdrawals from the said partnership amounted to \$96,317.33; that in truth and in fact plaintiff has made no such withdrawals but that, at the direction of the defendant, Nathan Borin, there has been charged to her account on said partnership books numerous items of expense which are in truth and in fact not chargeable to her; that the said defendant Borin, among other things, has charged to the plaintiff's account expenses of the parties in maintaining their household, purchases made for the minor daughter of the

Government's Exhibit "T"—(Continued)

parties, items for articles which the said Nathan Borin had bestowed upon the plaintiff as gifts, items consisting of checks made payable to the plaintiff, which were fraudulently endorsed by the defendant, Borin, and by other persons at the direction of the defendant Borin, without the knowledge, consent or authority of the plaintiff, items of traveling expense for the plaintiff and defendant Borin for trips which they took together, items of attorneys' fees, which were the sole obligation of the defendant Borin, items concerning which this plaintiff has no knowledge, loans allegedly made by the defendant to brothers of the plaintiff, items lost by the defendant Borin as a result of playing cards and gambling, items for night club expenses and hotel bills of defendant, Borin and other persons unknown to plaintiff, a bill for a doctor who operated upon the minor child of the parties hereto and numerous other items of similar ilk; that while the plaintiff has demanded that said account be itemized and submitted to the plaintiff, or that she be permitted to examine the books, checks, records and vouchers of said defendant, the defendant Borin and the defendant Locker have refused and still continue to refuse to permit accountants or auditors retained by the plaintiff to examine said books and records; that in truth and in fact the excess of the amount of capital, salaries and profits over the amount of expenditures properly chargeable to the plaintiff as of September 12th is approximately \$75,000.

Government's Exhibit "T"—(Continued)

(8) That defendant Borin has, on numerous occasions during the time that the partnership was in existence, charged as expenses of the partnership sundry amounts which are in truth and in fact directly chargeable to the said defendant; that plaintiff is informed and believes, and upon such information and belief states the fact to be that defendant Borin has charged vast sums of money which he has expended in night clubs, cabarets and other places of entertainment as partnership expenses, when, in fact, they were not; that he has charged numerous items involving hotel bills for his own personal pleasure to the partnership as expenses; that he has charged the purchase and operation of two Cadillac automobiles to the partnership as firm expenses, when, in fact, they were for the individual use of the defendant Borin; that he has given lavish gifts costing substantial sums of money to various persons and charged the same as an expense of the partnership, when, in truth and in fact, said gifts were made solely for the individual benefit of the defendant Borin; that he has in numerous other ways utilized the funds of the partnership for his own individual benefit without charging the same to his individual account; that as a result thereof the share of the profits due to the plaintiff herein has been greatly lessened and reduced; that the defendant Locker has improperly and fraudulently made the entries upon the books of the partnership at the direction and instruction of the defendant, Borin, and without regard to the interests and

Government's Exhibit "T"—(Continued)

rights of the other partners including the plaintiff and to their substantial detriment; and that upon a true and correct accounting and a proper allocation of said expenses the share of the partnership belonging to the plaintiff will be greatly increased.

(9) That since September 12, 1945, and until January of 1946, the partnership continued to operate under the direction and control of the defendant, Borin, and to make large profits; that the plaintiff has requested that she be furnished with a statement of the profits earned and the amounts that should be credited to her account in the partnership, but that the defendant, Borin, and the defendant, Locker, have refused and continue to refuse to furnish this information to the plaintiff and have refused and continue to refuse to permit her or her agents to examine the books of the partnership; that plaintiff believes, and upon information and belief states the fact to be that the profits of the partnership in the four-month period following September 12, 1945, are in excess of \$200,000; that under the terms of said partnership agreement plaintiff is entitled to ten per cent thereof; that, as hereinbefore alleged, the plant operated by said defendant, Borin, as the general partner of the limited partnership known as Borin Art Products Company was completely destroyed by fire in January of 1946; that the effect of said fire was to force the discontinuance of the business operated by the partnership and to transfer said partnership assets into a number of causes of action against the

Government's Exhibit "T"—(Continued)

insurance companies in which said partnership was insured; that the defendants, Springfield Fire & Marine Insurance Co., Aetna Insurance Co., Fireman's Fund Insurance Co., Liverpool & London & Globe Insurance Co., Northern Assurance Co. of London, Glens Falls Insurance Co., Home Insurance Co., United States Fire Insurance Co., and Underwriters Service Association, carried policies of insurance naming Borin Art Products Company as the assured and protected said partnership against loss by fire, and also that said partnership was protected against loss of profits resulting from said fire, that by reason of said fact, the plaintiff's interest in the assets of the partnership now consists substantially of a 10% interest in the claims and causes of action against the aforesaid insurance companies, and therefore she makes said insurance companies parties defendant hereto.

(10) That the defendant, Borin, has threatened to collect the proceeds of the aforementioned insurance policies from the defendant companies and to take the same and remove himself from the jurisdiction of this Court. Plaintiff avers that unless restrained by an order of this Court, she fears that the defendant, Borin, will collect the proceeds of said policies and will remove himself from the jurisdiction of this Court and as a result thereof that plaintiff will be deprived of her remedy in the premises. Forasmuch, therefore, as plaintiff is without adequate remedy in the premises, except in a court of equity, and has no remedy at law, plaintiff prays for the following:

Government's Exhibit "T"—(Continued)

(a) That the limited partnership described in the Complaint be declared dissolved insofar as the plaintiff is concerned as of the date of the filing of this Complaint;

(b) That an accounting may be had and taken of all and every the said co-partnership dealings and transactions from the time of the commencement thereof, and also an accounting of the moneys received and paid to the plaintiff and the defendant, Borin, in regard thereto;

(c) That the defendant, Borin, may be decreed to pay to the plaintiff what, if anything, shall, upon the taking of the said accounts, appear to be due to her;

(d) That the defendant, Nathan Borin, may be restrained and enjoined by the order of this Honorable Court from collecting the proceeds of the aforementioned insurance policies pending the disposition of this cause and the payment to the plaintiff of the amount due to her;

(e) That the defendants, Springfield Fire & Marine Insurance Co., Aetna Insurance Co., Fireman's Fund Insurance Co., Liverpool & London & Globe Insurance Co., Northern Assurance Co. of London, Glens Falls Insurance Co., Home Insurance Co., United States Fire Insurance Co., and Underwriters Service Association, be restrained and enjoined from paying to the defendant Borin, or to any assignee or transferee of said defendant, Borin, such sums as they may be obligated to pay under the terms of the said insurance policies covering the premises, chattels, equipment and profits of the said

Government's Exhibit "T"—(Continued)
partnership; that said corporate defendants be ordered and directed to pay to the plaintiff such sums of money as this Court may find are justly due to her as and for her interest in said partnership.

(f) That the plaintiff may have such other and further relief as equity may require and to the Court shall seem just and proper.

/s/ Claire B. Borin.

Lederer, Livingston, Kahn & Adsit, 160 North
La Salle Street, Chicago, Illinois, Central 3985,
Attorneys for Plaintiff.

State of Illinois,
County of Cook—ss.

Claire Borin, being first duly sworn, upon her oath, deposes and says that she has read the foregoing complaint by her subscribed; that she knows the contents thereof, except as to those matters stated to be on information and belief; that said complaint is true in substance and in fact except as to those matters stated to be on information and belief and as to said matters, she believes them to be true. Further affiant says not.

/s/ Claire B. Borin.

Subscribed and sworn to before me this 8th day
of February, 1946.

/s/ (Illegible),

Notary Public. My Commission Expires Nov. 12,
1946.

GOVERNMENT'S EXHIBIT "U"

In the Appellate Court of Illinois
First District

April Term. A. D. 1946

No. 43689

CLAIRE B. BORIN, Appellee,

vs.

NATHHAN BORIN, Appellant.

Appeal from Superior Court, Cook County.

Honorable Frank M. Padden, Judge Presiding.

ABSTRACT OF RECORD

Simon Herr,
Harold Tucker,
Attorneys for Appellant.

[Pen Notation: Need not be certified. George T.
Altman.]

In the Appellate Court of Illinois
First District

April Term, A. D. 1946

CLAIRE B. BORIN, Plaintiff,

vs.

NATHAN BORIN, Defendant.

Appeal from Superior Court, Cook County.

Honorable Frank M. Padden, Judge Presiding.

Government's Exhibit "U"—(Continued)

ABSTRACT OF RECORD

Placita.

Complaint for divorce filed March 22, 1945. Complaint alleges that both parties were residents of the City of Chicago, County of Cook and State of Illinois for one year last past immediately prior to the filing of complaint; that they were married on November 11, 1933, at Agua Caliente, Mexico, and lived together until February 14, 1945; that during all of said time the plaintiff conducted herself towards her husband as a good, true, chaste and affectionate wife; that there was one child born of said marriage, namely Bonnie Joy Borin, then three and one-half years old; that said child is in the care and custody of plaintiff, that she is a fit and proper person and entitled to retain her care, custody and control.

That shortly after the marriage the defendant was guilty of extreme and repeated cruelty; that on three prior occasions the plaintiff found it necessary to file actions for divorce; that on these occasions reconciliations took place. Three acts of cruelty are alleged as occurring on June 29, 1944, July 2, 1944 and in the month of January, 1945; that defendant is a man of violent and ungovernable temper, caused plaintiff great mental pain, anguish and suffering; has used vile, ugly and offensive language, and threatened her life. Writ of injunction asked to restrain defendant from committing any such acts. Plaintiff did on February 14, 1945, at the request of defendant, in order to

Government's Exhibit "U"—(Continued)

safeguard the health of the minor child, go to Florida for a period of approximately four weeks; while there she was accused by defendant of wrongful associations and improper conduct and threatened her life; returned to Chicago with the child on March 20, 1945, to find that defendant had removed himself and his effects from their apartment on or about March 18, 1945.

Defendant is a man of great wealth and large income and well able suitably and properly to maintain plaintiff and her minor child in the station in life in which they have lived; that defendant for some time past, especially the past several years has been associated with and been in the company of female persons from the theatrical and night club professions, has lavished large sums of money on clothes and entertainment for such persons; said persons frequenting his living quarters in New York on his visits there and the home of plaintiff and defendant in Chicago during plaintiff's absence.

For many years prior to May 1, 1943, defendant has been engaged in a business known as Borin Art Products Corporation, manufacturing various art products, with offices in Chicago, Illinois, and various other cities; prior to May 1, 1943, plaintiff acquired a stock ownership in the business, namely 80 shares or ten per cent of the outstanding stock. A trust created, Mark Winston, sole trustee, for the benefit of Bonnie Joy Borin and two other children of defendant by a prior marriage having 120 shares. May 1, 1943, stockholders dissolved Borin Act

Government's Exhibit "U"—(Continued)

Products Corporation and entered into a partnership agreement; plaintiff's interest in said business ten per cent and that of trust fifteen per cent. Fearful that defendant will withdraw, dissipate and misappropriate all or part of the assets of the business, among which is cash on hand and on deposit in various banks, securities, inventories, fixtures, accounts receivable and various other items of large and substantial value, plaintiff seeks an injunction to issue without notice, and that she be excused from posting a bond to restrain said action.

* * * * *

GOVERNMENT'S EXHIBIT "W"

CLAIM

* * * * *

Name of taxpayer or purchaser of stamps: Claire Morse (formerly Claire Borin).

* * * * *

The income on which claimant paid income taxes in the amount of \$14,925.62 for the taxable year 1944 consisted of \$32,239.42 attributed to claimant as a limited partner in the Borin Art Products Co., 1325 S. Cicero Avenue, Cicero, Illinois. Claimant was not, during the taxable year 1944 or at any other time, a bona fide limited partner in said firm but was merely so designated for tax purposes by her then husband, Nathan Borin, and never in fact received the income attributed to and reported by her at the said Borin's direction.

* * * * *

[Endorsed]: No. 15963. United States Court of Appeals for the Ninth Circuit. Claire B. Morse, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: April 7, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 15963

CLAIRE B. MORSE, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Appellant intends to rely upon the following points:

1. Except insofar as consistent with the findings proposed in the District Court by appellant, the findings of that court are not supported by the evidence.

2. The findings proposed in the District Court

by appellant are relevant and fully supported by the evidence, and should have been adopted by that court. In failing to include in its findings any of said findings proposed by appellant, the District Court failed to carry out its duty under Rule 52 of the Federal Rules of Civil Procedure.

3. The evidence does not support the findings of the District Court that prior to the dissolution of the Borin Art Products Corporation appellant was the "owner" of 80 shares of stock of said corporation.

4. The government admitted that the 80 shares of stock found by the court to have been "owned" by appellant were transferred from the name of Nathan Borin to that of appellant without her knowledge "prior to the dissolution of the corporation as a part of the scheme for dissolution of the corporation and creating the partnership," and said admission is supported by documents in the government's file.

5. The evidence does not support the finding of the District Court that appellant received a 10% interest in an entity known as Borin Art Products Company.

6. The evidence does not support the implied finding of the District Court that the said entity was in fact a true and bona fide partnership.

7. The evidence on the contrary supports the conclusion that the said entity was not a true and bona fide partnership.

8. There is no evidence whatever to support the finding of an "agreed value" of \$12,000.00 shown in Paragraph VIII of the District Court's findings.

9. The evidence on the contrary supports the conclusion that if any such interest did exist its value was less than zero.

10. If there was an "agreed value," such value has no relevance to this proceeding, since the parties hereto had no connection with the purported agreement.

11. There is no finding that appellant actually received from Borin Art Products Corporation any money or property of any kind.

12. There is no finding that appellant received anything from Borin Art Products Corporation, directly or indirectly, of an actual value of \$12,000.00 or any other amount.

13. Appellant was not estopped to deny that she ever owned any stock in the said corporation or that she ever received any interest in the said partnership.

14. Appellant did not ratify any partnership agreement, and appellee is not in a position to assert any such ratification.

15. Appellee failed to plead either estoppel or ratification.

16. Appellee failed to prove either estoppel or ratification.

17. Assuming, without admitting, that appellant was a limited partner in said entity, Borin Art Products Company, she would not, as such limited partner, be personally liable for any debts of the partnership where, as here found by the District Court, she did not receive any money, property, or other assets from the partnership.

18. If there was any transferee liability of appellant in respect of any tax liability of said corporation, said liability was exhausted by the payment which was made by others of the assessment of \$12,000.00 against appellant in respect of taxes of the said corporation for the years 1940 and 1941.

19. Appellee failed to plead or prove that there was in fact any unpaid balance of taxes of said Borin Art Products Corporation for any period.

20. The District Court erred in overruling appellant's objections to the introduction of evidence in each instance shown in the record designated by appellant for printing. The reference here is to both documentary and oral evidence.

21. Appellee's exhibit U is not properly a part of the record, having been held by the court during trial to be immaterial, and appellant having been led by such holding to take no action during trial to strike the exhibit as being hearsay.

22. Appellant's exhibits for identification, Nos. 12 and 13, were properly admissible, and should have been admitted.

23. The burden of proving appellant was liable as transferee was upon appellee.

24. The District Court erred in denying the motion in respect of certain exhibits filed January 24, 1958, by appellant.

25. Appellant relies further upon all of the points made in her objections to findings of fact, conclusions of law, and judgment lodged by the government, and upon the points made in her motion for new trial. (Both of said documents have been designated for printing.)

26. The District Court should have granted appellant's motion for new trial.

27. The District Court's conclusions of law are not supported by its findings.

28. The District Court's judgment is not supported by its findings and conclusions of law.

/s/ GEORGE T. ALTMAN,
Attorney for Appellant.

[Endorsed]: Filed April 12, 1958. Paul P. O'Brien, Clerk.



No. 15963

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLAIRE B. MORSE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

GEORGE T. ALTMAN,
233 South Beverly Drive,
Beverly Hills, California,
Attorney for Appellant.

FILED

NOV 10 1958

PAUL P. O'BRIEN, CLERK



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No. 15963
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CLAIRE B. MORSE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

This appeal involves the asserted liability of appellant for income and excess profits taxes of a corporation for the calendar year 1942 and the period January 1, 1943, to April 30, 1943.

Appellant is an individual residing in Los Angeles, California [R. 4].

The suit was instituted by appellee, by way of a suit in intervention. The jurisdiction of the District Court was asserted by appellee under Title 28, United States Code, Sections 1340 and 1345, and Title 26, United States Code, Section 7401 [R. 4].

Judgment was entered in favor of appellee on February 17, 1958 [R. 58]. A motion for new trial was filed on February 21, 1958 [R. 65]. The motion was heard

March 3, 1958 [R. 59], and denied on the same date.* Notice of appeal was filed March 7, 1958 [R. 71]. The jurisdiction of this Court is based on 28 U. S. C., Section 1291.

Questions Presented.

The question here is whether appellant is liable as a transferee for income and excess profits taxes of Borin Art Products Corporation, and, if so, the amount of such liability.

Statutes Involved.

The statutes involved in this proceeding are set forth in the Appendix, *infra*.

Statement.

Because of the many separate issues raised by this appeal the facts pertinent to each issue are stated in connection with the argument on that issue. The facts are there also keyed to the record. Because of this only a general and introductory statement is included here.

This is a proceeding for collection of income and excess profits taxes from appellant as alleged transferee of an Illinois corporation, located in Illinois, and known as Borin Art Products Corporation [R. 4, 11]. That corporation was incorporated in September, 1932 [R. 89]. In November, 1933, appellant married Nathan Borin of that corporation [R. 83]. As of May 1, 1943, the corporation was dissolved and replaced by an alleged partnership under the name of Borin Art Products Company [R. 49]. Appel-

*See page 4 of unprinted transcript of proceedings March 3, 1958. The written order of denial was filed on March 11, 1958 [R. 70].

lant, however, did not know that this occurred until two years later, when she began suit against Nathan Borin for divorce and in that connection discovered certain documents at her home which she turned over to her attorneys in the divorce action [R. 86-87].

The documents apparently indicated to the attorneys that on the books of the business she was shown as having some interest in it although this was the first she knew about that [R. 88].

As the evidence and the Findings show, the so-called partnership agreement under which the alleged partnership was formed was not signed by her, nor did she authorize anyone to sign it for her [R. 55, 82-83]. As indicated above, she did not even know that it had been formed. Not only did she have no connection with the agreement; what purports to be her signature on it is an attempted simulation of her actual signature and therefore a forgery [R. 81-83].

The attorneys in the divorce proceeding told appellant that according to the documents she had some interest in the alleged partnership [R. 88], and in aid of the action for divorce she signed pleadings, as she had previously signed other business papers, without examining them [R. 95], in faith that her attorneys were doing what was necessary in connection with a divorce [R. 97-98, 109].

Although the purported partnership agreement listed her as a shareholder of the predecessor corporation and as a limited member of the partnership, she at no time knew that she was, and never at any time received anything from the corporation either as dividends or in liquidation [R. 50, Fndg. IX, R. 94], nor did she ever receive anything from the alleged partnership [R. 55, Fndg. XX,

R. 94], although over a period of three and one-half years Nathan Borin drew out of it more than \$300,000.00 [R. 151].

Her divorce proceedings dragged over several years and she was finally divorced from Nathan Borin in 1949 [R. 84]. Later she married a Mr. Buchman so that her name became Claire Buchman [R. 83]. Her present name is, of course, shown in this proceeding.

In 1946, during the pendency of the divorce proceeding the plant of the alleged partnership, Borin Art Products Company, was destroyed by a fire [R. 160-161]. Although there was insurance paid in the total amount of \$900,000.00 [R. 105], and also, as indicated above, Nathan Borin drew out of the partnership over a three and one-half year period over \$300,000.00, appellant, as the Findings show, never received anything.

After the dissolution of Borin Art Products Corporation additional income and excess profits taxes were determined against it for the years 1940 and 1941, and also 1942 and the portion of 1943 prior to its dissolution. The taxes for 1940 and 1941 were paid in full [R. 13]. As to the taxes for 1942 and 1943 the government first proceeded on the basis that the alleged partnership was a mere fiction and the *alter ego* of Nathan Borin. As late as March 30, 1950, it formally advised appellant that this was its holding and that income of the so-called partnership was the income of Nathan Borin [R. 13]. But the government found itself unable to collect the taxes still due from the alleged partnership as the *alter ego* of Nathan Borin and so reversed itself and took the position that the partnership was valid and that the purported limited partners were liable for the taxes [R. 105].

In respect to a portion of the corporation's taxes for 1942 and 1943, appellant signed a waiver form under the provisions of the Internal Revenue Code for waiver of the right of appeal to the Tax Court. There is strong evidence, however, that appellant signed that document, together with two extensions of time in respect to individual taxes, under the representation and in the belief that all three documents were merely extensions of time like those which she had been filing constantly on the recommendation of her attorney or accountant [R. 152].

An assessment was made against appellant on the basis of that waiver, and this proceeding is an action by the United States for collection of that assessment. A proceeding previously filed by appellant for injunction is, the parties have agreed, now moot and this proceeding consists only of the said suit by the United States for collection [R. 48].

In the course of this action there was a pretrial conference, a pretrial conference order [R. 10-19], and a trial. After the trial appellant submitted proposed Findings so as to cover all pertinent parts of the evidence [R. 24-32]. The trial court, however, disregarded those proposed Findings entirely and signed the Findings submitted by appellee [R. 47-58]. A request was made by appellant for a new trial on the basis of surprise in connection with certain of those Findings and certain exhibits [R. 59-65, 69-70], but the request was denied [R. 70].

It was conceded by appellee, and the trial court found, that appellant never in fact received anything from either the corporation or the partnership [R. 50, 55, 105]. The trial court also found that she did not sign the partnership agreement and that no one was authorized by her to sign it for her [R. 53]. Nevertheless, it held that she was

obligated under the agreement on the basis of estoppel, primarily because of her conduct, in the course of her divorce proceedings, of signing a complaint for dissolution of the alleged partnership [R. 56, 129-130]. The court conceded that she knew nothing about the action herself and that the proceeding was one concocted by her attorneys [R. 130]. The trial court also found and appellee conceded that she never got anything [R. 55, 105, 132]. In fact, it was indicated that the proceeding was not in fact ever prosecuted [R. 101]. Nevertheless, the trial court held that she was *estopped*, because of that proceeding, from denying the partnership [R. 135-136].

It is in this posture that this cause is now before this court. As noted at the outset of this statement the facts pertaining to any issue are stated in greater detail in connection with the argument on that issue.

Specifications of Error.

The court below erred as follows:

1. In finding that appellant prior to the dissolution of Borin Art Products Corporation was the owner of 80 shares of stock of said corporation.
2. In assuming for the purpose of its Findings that the purported partnership known as Borin Art Products Company was a true and bona fide partnership.
3. In finding that appellant received a 10 per cent interest in the said partnership.
4. In finding that appellant received such an interest for stock of said corporation.
5. In finding that the said interest was worth \$12,-000.00, or any part thereof.

6. In finding that
“subsequent to the execution of the partnership agreement, she [appellant] recognized and ratified the partnership agreement, and became obligated thereunder, as fully as though she had personally placed her signature thereon at the time of its execution.”
7. In concluding that appellant was estopped to deny the said partnership.
8. In finding that appellant was liable at all in the absence of pleading or proof of nonpayment of the taxes of said Borin Art Products Corporation.
9. In concluding that appellant was liable as transferee for the taxes of Borin Art Products Corporation.
10. In assuming that the burden of proof was upon appellant.

Summary of Argument.

The burden of proof that appellant had received assets of Borin Art Products Corporation as transferee was upon appellee. In any case, in view of the clear and cogent evidence introduced by appellant showing that she was never a stockholder of Borin Art Products Corporation, nor a member of the purported successor partnership, Borin Art Products Company, and that she never received any money or property of any kind from either the said corporation or the said partnership, the burden of proof that she had received assets from the said corporation as a transferee was upon appellee.

The parties stipulated, and the trial court found, that all of the assets of the said corporation were transferred, subject to its liabilities, to the purported partnership, Borin Art Products Company. What the trial court found

she had received was an interest as limited partner in the said partnership.

The parties stipulated, however, in the pretrial conference order that prior to and at the time of transfer of assets by said corporation to said partnership, the said partnership was the sole stockholder of the said corporation. It necessarily follows that appellant was not a shareholder of the said corporation, that she did not as a shareholder receive any of its assets, and that if she did receive an interest in the said partnership she did not receive it from the corporation. Indeed, the trial court failed to find that she had received even the said interest from the corporation.

Appellee admitted that the stock which it contended was acquired by appellant was acquired by her without her knowledge as a part of the scheme for dissolution of the corporation and creating the partnership. That admission is binding upon appellee and negatives any real ownership of stock by appellant.

Even as to a nominal ownership of stock there is no reference whatever in the record except in (a) an alleged partnership agreement which the evidence shows clearly was forged—said document having been introduced by appellant but only for the purpose of showing the forgery—and (b) an abstract not prepared by appellant, or anyone on her behalf, of a pleading in a divorce action which the trial court held again and again was immaterial. Because of such repeated holding by the trial court that the said abstract was immaterial, appellant failed to move during the trial to strike it, so that on the Court's finding of such stock ownership by appellant, appellant was caught by surprise and her motion for new trial on that basis should have been granted.

As to the trial court's holding that appellant had received an interest in the alleged partnership, it further erred for the reason that the alleged partnership was not a true and bona fide partnership but a mere sham and the *alter ego* of Nathan Borin. Appellee itself treated it as a sham as long as Nathan Borin was still solvent and could pay the higher taxes computed on that basis. As soon as the partnership "fell on its face" and Nathan Borin no longer had funds, appellee shifted its position and attempted to hold the purported limited members of the partnership, including appellant.

Appellee's own evidence shows that the partnership was a mere sham and the *alter ego* of Nathan Borin. Additional evidence in support of that conclusion contained in an exemplified copy of appellant's decree of divorce was offered by appellant and should have been admitted. Even the purported partnership agreement shows on its face that the partnership was a sham and the mere *alter ego* of Nathan Borin. Finally, the trial court itself stated several times in the course of the trial that it regarded the partnership as a sham.

It is clear from the evidence that appellant never actually received any interest in the alleged partnership. Also there is no evidence to show what the interest, if any, was worth, except for evidence indicating that it was worthless. Furthermore, since it is clear that if appellant ever did receive such an interest she did not receive it from the corporation, she is not because of it liable as a transferee.

The trial court found as facts that appellant never received any money or property from the corporation, nor from the alleged partnership. Indeed, it did not find that she had in fact received even an interest in the alleged partnership but held her liable on the ground that after

the alleged partnership had been formed she acted as if she was a member. The trial court based its conclusion explicitly and entirely on the ground of estoppel.

However, the record is completely devoid of any evidence supporting an estoppel. There were no acts of appellant upon which appellee relied to its injury, and, as the Court itself found, she never received any benefits from either the corporation or the partnership. On the contrary, the Court repeatedly held that the equities were in her favor, and long after any of the acts of appellant relied on by appellee, appellee made a formal determination that the partnership was a sham and that Nathan Borin was its real owner. In addition, estoppel must be pleaded and there is no such pleading by appellee.

Appellee also failed to plead or prove that the taxes of Borin Art Products Corporation had not in fact been paid. There is not even a Finding to that effect and this is necessary to support transferee liability.

Furthermore, even if appellant was a limited partner, a limited partner under the law of the State of Illinois, which is applicable here, is not liable for any of the debts of the partnership. Moreover, if appellant did receive any assets as a transferee, her resulting liability was exhausted by the payments made, after the transfer of assets by the corporation, for her account, in respect of the corporate taxes of years prior to those here involved.

ARGUMENT.

I.

The Trial Court Erred in Assuming as a Matter of Law That Appellant Had the Burden of Proving That She Was Not Liable as Transferee of the Assets of Borin Art Products Corporation.

The assumption referred to is shown at R. 56, Conclusions of Law, paragraph II. The Court there stated:

“The defendant has not sustained her burden of proving that she is not liable, at law or in equity, as transferee of the assets of Borin Art Products Corporation, for deficiencies in taxes assessed against said Corporation.”

In thus assuming that the burden of proof was on appellant the trial court erred.

A. In Any Transferee Case the Burden of Proof of Transferee Liability Is Entirely Upon the Government.

In a transferee proceeding before the Tax Court the burden of proof is expressly upon the government to show liability as transferee. (I. R. C. 1954, Section 6902(a); I. R. C. 1939, Section 1119(a).) But this is only a statement of what the rule has always been in all courts in connection with burden of proof in transferee cases.

Prior to the enactment of provisions giving the Tax Court jurisdiction in transferee cases the government's procedure in such cases was by a bill in equity. (*Phillips v. Commissioner*, 283 U. S. 589, 592, 51 S. Ct. 608, 610.) In such a proceeding the burden of proof was, of course, upon the government. (*United States v. Lam* (D. C., W. D., Ky., 1927), 26 F. 2d 830; 9 Mertens, Sec. 53.45.) The purpose of the express provision respecting burden of

proof before the Tax Court was merely to leave the burden of proof where it theretofore was in transferee cases. (9 Mertens, Sec. 53.45.)

It was in the same manner that this Court and other courts reached a conclusion in fraud cases that even on a suit for refund by the taxpayer the burden of proof in respect of fraud was upon the government. (*Ohlinger v. United States* (C. A. 9), 219 F. 2d 310, citing and quoting from *Vitelli & Son*, 250 U. S. 355.) As it was also shown in the *Vitelli* case, as summarized in *Ohlinger*, if the burden with respect to fraud were placed on the taxpayer it would involve proof of a negative, and the same situation obtains with respect to transferee liability.

It follows that the District Court erred as a matter of law in assuming that the burden was upon appellant to prove that she was not liable as a transferee of the assets of Borin Art Products Corporation.

B. In Any Event, the Assessment Notice Here Operated at Most as a Presumption and Since Substantial Evidence Supporting the Taxpayer Was Introduced, the Burden Shifted to the Government.

1.

It is significant in this connection that the trial court failed in its obligation under F. R. C. P., Rule 52, "to find the facts specially," by failing to include in its findings all the pertinent and uncontradicted facts shown by the evidence, as detailed in the proposed findings [R. 24-32], filed by appellant.

A brief rundown of those proposed Findings, and the citations keying them to the record, shows that all of them are pertinent, and that most of them are wholly uncontradicted. We shall not burden the Court by repeating them

here. They are all shown in the various factual elements given in this brief and likewise keyed to the record.

The trial court, however, completely disregarded these proposed Findings of appellant and signed the Findings as prepared by appellee.

We submit that in so doing the trial court failed in its obligation to find all the facts.

This proceeding is in effect one in equity. (*Phillips-Jones Corporation v. Parmley*, 302 U. S. 233, 235, 58 S. Ct. 197, 198; *Winger v. Chicago Bank*, 394 Ill. 94, 110.) It follows that "there must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion . . . can rationally be predicated." (*Kelley v. Everglades Drainage District*, 319 U. S. 415, 420, 63 S. Ct. 1141, 1144.) It is the duty of the District Court "appropriately and specifically to determine all the issues which the case presents. This is an essential aid to the appellate court in reviewing an equity case. . . ." (*Interstate Circuit v. United States*, 304 U. S. 55, 56, 58 S. Ct. 768, 769.)

Especially in connection with burden of proof it is important for the Findings to show all of the pertinent facts that were proved. We submit again that the trial court failed in its obligation to find the facts.

2.

The proceeding here having been reduced before trial to the proceeding in intervention [R. 48, par. III], appellee was in effect the plaintiff. In other words, appellee was in the position of suing for taxes allegedly due it. In such a suit the assessment has only a *prima facie* effect (*United States v. Rindskopf*, 105 U. S. 418, 26 S. Ct. 1131; *Williamsport Wire Rope Co. v. United States*, 277 U. S. 551,

48 S. Ct. 587; *Wickwire v. United States*, 275 U. S. 101, 48 S. Ct. 43; *I. B. Whetstone v. United States* (D. C. N. D., Ill.), 56-1 U. S. T. C. par. 9424, cert. den. 352 U. S. 879, 77 S. Ct. 101); and that effect disappears as soon as any substantial evidence is introduced by the taxpayer. (*St. Louis Union Trust Company v. Becker* (C. A. 8), 76 F. 2d 851, affirmed 296 U. S. 48, 56 S. Ct. 78.) Here not only substantial but very clear evidence was introduced in support of appellant.

In the first place, it was stipulated by the parties in the pretrial order that all of the assets of the corporation were transferred to an entity known as Borin Art Products Company [R. 12, par. 5]. It was also stipulated in the pretrial order that prior to and at the time of said transfer the said entity was the sole shareholder of the corporation [R. 12, par. 7]. It follows of necessity that none of the assets of the corporation were transferred to appellant. The binding effect of these stipulations we shall consider at another point, *infra*. For the purpose of this part of the brief these stipulations are referred to only as being substantial evidence.

In the second place, evidence to the same effect was elicited by the Court itself in the course of interrogating appellant. We refer to the following at R. 85:

“The Court: Did you ever own any stock in the corporation?”

The Witness: No, never owned anything.

* * * * *

The Court: Did you ever receive any dividends from the corporation?

The Witness: No, your Honor, never received anything.

The Court: Then the corporation was liquidated, wasn't it?

The Witness: I never knew anything about his [Nathan Borin's] business, your Honor. He never discussed his business with me.

The Court: When this so-called partnership was formed, were you given a copy of the partnership agreement?

The Witness: I never knew it was formed. I never knew anything about it, nothing."

In the third place, appellee, by its counsel, admitted in open court [R. 136]:

"However, in the partnership where each of their proportionate shares in the corporation—the shares in the corporation, which she [appellant] acquired, by the way, she may not have had knowledge of at the time, but she acquired prior to the dissolution of the corporation as part of the scheme for dissolution of the corporation and creating the partnership."

The binding effect of this admission, too, we shall consider at another point, *infra*. For the purpose here we are treating it as substantial evidence. What it says is that there was a transfer of stock into appellant's name, of which she may have had no knowledge, and therefore without delivery [R. 89], which transfer was made "as part of the scheme for dissolution of the corporation and creating the partnership." That such a device is a mere sham and establishes no prior ownership of stock has been shown in *Commissioner v. Tower*, 327 U. S. 280, 66 S. Ct. 532, and *R. E. L. Finley v. Commissioner* (C. A. 10), 58-1 U. S. T. C. par. 9517.

As a fourth item of such evidence there is the completely uncontradicted testimony of a handwriting expert, not

only that appellant did not sign the partnership agreement, which the Court below found, but also that the attempt was made on the document to simulate her signature, so that in fact it was forged. We refer to the testimony of Mr. Harris [R. 81-83], whom appellee stipulated [R. 81] was qualified as a handwriting expert.

In the fifth place, the assessment itself rests on very infirm ground. It was stipulated here that no notice of deficiency in respect of the taxes involved was ever sent to appellant [R. 12, par. 8]. It follows that without a valid and effective waiver of such notice and of the right of appeal to the Tax Court the assessment involved here was invalid. (I. R. C. 1939, Sec. 272(a)(1), (d), made applicable to transferee liability by I. R. C. 1939, Sec. 311(a); *Steiner v. Nelson* (C. A. 7, Oct. 16, 1958), 58-2 U. S. T. C. par. 9871.)

To begin with, such a waiver is ineffective unless actually filed with the Commissioner, as the statute requires (*Steiner v. Nelson, supra*), and there is no evidence or Finding here that the waiver was so filed. As a second factor, there was clear evidence that appellant misunderstood the waiver document as a mere extension of time.* In that connection the trial court erred in its Finding of the said waiver [R. 52, Fndg. XII], over appellant's objections [R. 36-38], and in including only a part of the waiver document and omitting the top and bottom which showed that it was merely a waiver of the right to petition the Tax Court under I. R. C. 1939, Section

*The waiver form referred to at R. 91-92, as part of Appellant's Exhibit 8 for Identification, was later introduced by appellee, over appellant's objections, as its Exhibit Z [R. 128-129]. The letter of March 13, 1951, referred to at R. 92 and again at R. 118 and 127, is shown in full at R. 152-153.

272(a), as described in *Flora v. United States*, 355 U. S. 881, 78 S. Ct. 1079.* In that connection the trial court also erred in refusing [R. 127] to admit appellant's Exhibit 13 for identification [R. 152-153] bearing out testimony by appellant [R. 91-93] that she thought the waiver was simply one of the many extensions of time which she was requested to sign [R. 96] and that she was misled into believing that this document was such an extension of time. It is clear from the evidence that appellant had no knowledge of the meaning of these documents, except that she thought they were all waivers of time [R. 91-93, 96].

Thus with this substantial evidence that appellant never owned an interest in the corporation, that she didn't know that the corporation was dissolved or the partnership formed, that the dissolution of the corporation and formation of the partnership was just a scheme, and that the parties who did carry through that scheme forged her signature on the purported partnership agreement, and the further fact that the assessment itself resulted from a mistake by appellant in signing a waiver of her right to petition the Tax Court in the belief that it was a mere extension of time, clearly the *prima facie* effect of the assessment was dissipated and the burden was placed on the government to prove that appellant had received assets as transferee of Borin Art Products Corporation.

*The entire waiver form is contained in the record on appeal. Appellant will request its printing if appellee or the court desires it.

C. The Present Suit by the Government Is Predicated Upon Fraud, in Fact or in Law, and the Derivative Trust Fund Doctrine Is Inapplicable Here Under the Evidence; It Results That the Assessment Gives Appellee No Support and the Burden of Proof Is Upon Appellee.

The question whether or not a person is liable as a transferee of a taxpayer is governed not by federal law but by the applicable law of the state in which the transfer is alleged to have taken place. (*Commissioner v. Stern*, 355 U. S. 810, 78 S. Ct. 1047, 1051; *United States v. Bess*, 355 U. S. 861, 78 S. Ct. 1054, 1056; *United States v. Truax* (C. A. 5), 223 F. 2d 229.)

The alleged transferor here was an Illinois corporation [R. 11], located in Illinois [R. 4], and at the time of the alleged transfer appellant was a resident of Chicago, Illinois [R. 142]. The transfer was to an alleged partnership, Borin Art Products Company [R. 49], also located in Illinois [R. 172]. We shall show under Point III below that the said alleged partnership was a sham and the *alter ego* of Nathan Borin. For the purpose here we shall assume that it was what it purported to be.

Under the law of Illinois, as is true under the law of most states, transferee liability arises from a transfer in fraud of creditors, either in fact or in law. (*Bouton v. Smith*, 113 Ill. 481; *Landers, Frary & Clark v. Vischer Products Co.* (D. C., Ill), 104 Fed. Supp. 411, affirmed (C. A. 7), 201 F. 2d 319; *LaCrosse Mfg. Co. v. Spring*, 323 Ill. App. 525, 56 N. E. 2d 146.) In a suit involving taxes on the basis of fraud the burden of proof is upon the government. This applies even to suits by taxpayers for refunds, for the reason that fraud is never implied. It must always be proved by the person alleging it, whether plaintiff or defendant. (*Ohlinger v. United States, supra.*)

It is true that because a voluntary transfer by a corporation of all of its assets leaving creditors unpaid is a fraud in law against the creditors, such assets become a trust fund for the benefit of creditors, and may be followed by them. (*Winger v. Chicago Bank, supra.*)

The trust fund doctrine, however, is one sounding in equity, and an action based upon it is in equity. (*Winger v. Chicago Bank, supra*, 394 Ill. at 111; *Phillips-Jones Corp. v. Parmley, supra*, 302 U. S. at 235, 58 S. Ct. at 198.) Here, however, there is no equity to support the trust fund doctrine. There is a Finding here [R. 50, Fndg. IX] that appellant never received any of the money, property, or assets of the corporation.* There is also a Finding that she did not sign the document referred to in the Findings as the partnership agreement nor did she authorize anyone to sign it for her [R. 53, Fndg. XVI]. It is also clear from the evidence that her signature placed upon the document was a forgery. It was not simply that her name was signed there by someone else but that it was signed with the intention of having it appear to be her signature [R. 81-83].

The trial court also found that appellant never received anything from the alleged partnership either [R. 55, Fndg. XX].** It found that “she didn’t get any benefits” [R. 132], that on the contrary the equities in this proceeding were in her favor [R. 131, 132]. Indeed, the trial judge went so far as to say that he was sorry for appellant [R. 119, 139], that she was “being called on to pay a tax on something she didn’t get” [R. 130], “upon property she

*Direct testimony on this is shown at R. 85 and 94.

**Direct testimony on this is given at R. 94.

didn't actually receive" [R. 131], but that he had been told by this Court not to do equity [R. 132], and that he would like to see this Court reverse him from an equitable standpoint [R. 131].

In that state of the record, as the authorities above show, the trust fund doctrine has no application. It results that the assessment must rest upon a charge of actual fraud, so that the burden of proof was wholly upon appellee.

It is clear that the trial court erred in assuming, as it did, that the burden of proof here was upon appellant.

II.

The Court's Finding That Appellant "Prior to the Dissolution of Said Corporation" Was the "Owner of Eighty (80) Shares of Stock of Said Borin Art Products Corporation" Is Contrary to the Evidence.

The reference under this point is to Finding VII [R. 49].

A. The Stipulation in the Pretrial Conference Order That Prior to and at the Time of the Transfer of Assets by Said Borin Art Products Corporation the Entire Stock of Said Corporation Was Owned by an Entity Known as Borin Art Products Company, Shows What Actually Occurred and Is Binding Upon Appellee and the Court.

It is a truism in tax law that what actually was done governs. (*United States v. Phellis*, 257 U. S. 156, 172, 42 S. Ct. 63. To the same effect, *Koch v. United States* (C. A. 9), decided 9/12/58, 58-2 U. S. T. C. par. 9831.) In the *Koch* case there was involved a partnership agreement and the question was whether the firm was in the picture making field, as the partnership agreement pro-

vided, or was not in that field, as its actual activities showed. This Court there stated:

“The jury, irrespective of the partnership agreement, had a right to view the activities of Maurice P. Koch to determine whether he was acting individually or as a representative of one or another of the corporations or for the partnership.”

In another case, *Vendig v. Commissioner* (C. A. 2), 229 F. 2d 93, all the outstanding stock of a sales corporation was owned by a parent corporation and an individual, and the individual transferred her sales corporation stock to the parent corporation. She received in return similar stock issued by the parent corporation, and then that corporation, as sole stockholder of the sales corporation, received upon liquidation thereof all of its assets subject to its liabilities for income taxes. It was held there that the individual stockholder did not receive any property of the sales corporation and was not its transferee. The individual did receive stock of the transferee corporation but she did not receive it from the transferor corporation. Therefore, it was held that she was not liable as a transferee.

In still another case, *Jacob, et al. v. Commissioner* (C. A. 9), 139 F. 2d 277, stock was placed by its owner in the names of certain other members of his family but he retained the certificates and when the corporation distributed its assets they were actually received by him. This Court there called it an “Indian gift.” It accordingly held that there was no transferee liability on the part of the persons in whose names the stock appeared.

The question here therefore is what actually happened and the parties have stipulated as to what actually happened.

What the parties have stipulated is that (a) the assets were transferred by the corporation to an entity known as Borin Art Products Company, and (b) that prior to and at the time of said transfer the Borin Art Products Company was the sole shareholder of the corporation [R. 12, par. 7]. It must follow that no part of the assets was transferred to appellant, and that if appellant had an interest in the alleged partnership, Borin Art Products Company, she did not get that interest from the corporation. (*Vendig v. Commissioner, supra.*)

Even the Findings [R. 50, Fndg. IX] clearly say that appellant did not receive any of the money, property, or assets of the corporation and they fail to spell out any receipt by her, of an interest in the alleged partnership, *from the corporation.*

The stipulation referred to in the pretrial conference order is binding upon the parties, and the Court may not find to the contrary. (Cyc. Fed. Proc., Vol. 9, Secs. 31.06, 31.43; *H. Hackfeld v. United States*, 197 U. S. 442, 25 S. Ct. 456; *Andrews v. Hotel Sherman* (C. A. 7), 138 F. 2d 524; *Globe Cereal Mills v. Scrivenor* (C. A. 10, 1956), 240 F. 2d 330; *Curto v. International Longshoremen and Warehousemens' Union* (D. C., Ore., 1952), 107 Fed. Supp. 805, affirmed (C. A. 9), 226 F. 2d 875, *cert. den.* 351 U. S. 963, 76 S. Ct. 1026; *United States v. Sinor* (C. A. 5), 238 F. 2d 271.) It is true that a stipulation may be modified by the Court to prevent manifest injustice (Cyc. Fed. Proc., Vol. 9, Sec. 31.43), but here the trial court has said again and again that the equities were in appellant's favor. We quote especially the following statement of the trial judge at R. 130:

"My sympathy is with Mrs. Borin. I think she is being called upon to pay a tax on something she didn't get."

And the following at R. 132:

“Mr. Altman, in the past eight years I have decided a number of law cases upon equity, and the Circuit tells me I shouldn’t do equity, that I should follow the law. I think the equity is in favor of your client.”

We are not saying that there is evidence contrary to the stipulation. We are only saying that even if there is there is no issue of justice here entitling the trial court to look beyond the clear-cut stipulation of the parties.

B. It Necessarily Follows From the Pretrial Stipulation Dealt With Above That Appellant Was Not a Transferee of Borin Art Products Corporation.

Clearly if the sole stockholder of the corporation at the time of the distribution was a person other than appellant, then appellant did not own any stock in said corporation at that time. Whether appellant may have owned some stock at an earlier time is, of course, wholly immaterial, although, as we shall show, even that position is not true.

C. Clear Testimony Elicited by the Trial Court Shows That Appellant Never Owned Any Stock in the Borin Art Products Corporation.

The testimony referred to is that quoted above under Point I, at pp. 14-15. At the same point in the testimony appellant testified also that she never attended a meeting of the Board of Directors, or an annual meeting of the stockholders, and that not until 1945 did she know that the corporation had been dissolved in 1943 [R. 85-88].

Also, there is nothing in the Findings to show that she knew anything about the dissolution of the corporation or the formation of the partnership before 1945, when she

brought suit against Nathan Borin for divorce. Indeed, the Findings state that the partnership agreement was not personally signed by her, and that she didn't authorize anyone to sign it for her [R. 53, Fndg. XVI]. The return filed for her for 1944 was, pursuant to demand by an employee of her husband, signed by her in blank prior to initiation by her of a divorce proceeding, so that the information subsequently entered thereon, without her knowledge, as to income of a partnership, was not disclosed to her [R. 54, Fndg. XVIII; 91, 103-104, 106-108]. A similar return filed in her name in 1946 for 1945 was not even signed by her [R. 54-55, Fndg. XIX].

Since appellant knew nothing about the dissolution of the corporation, or the formation of the partnership, until 1945, then the Findings fail to explain how, if she was a shareholder, the corporation could have been dissolved in 1943, unless the dissolution papers were also falsified, the Illinois law requiring notice to all shareholders. (Illinois Rev. Stats., 1957 Ed., Ch. 32, Secs. 157.75-157.76.) Thus not even the Findings consistently contradict the clear testimony, elicited by the trial Court, that appellant never owned any stock in Borin Art Products Corporation.

D. There Is No Admissible Evidence in the Record Showing That Appellant Ever Owned Any Stock of Borin Art Products Corporation.

Appellant's Exhibit I, being a copy of the purported partnership agreement of Borin Art Products Company [R. 140-147 (partial)], must be disregarded in this connection because it was introduced, pursuant to the pre-trial agreement, solely for the purpose of showing that appellant's signature thereon was a forgery [R. 17, par. B1]. When it was introduced reference was made to the

fact that it was introduced pursuant to that agreement [R. 99-100]. As already pointed out, the fact that her signature on said document was a forgery is clear [R. 81-83].

Appellee's Exhibit U, being an abstract of record in the divorce proceeding between appellant and Nathan Borin [R. 169-172 (partial)], must also be disregarded in this connection. That exhibit, which was not one of those listed in the pretrial order [R. 14-17], was repeatedly held by the trial court to be immaterial because it involved only a divorce action [R. 116-117, 133-134]. Indeed, the Court stated directly and explicitly that it based no conclusion upon that exhibit [R. 133, 135]. Because of these statements of the Court, appellant's counsel withdrew his own motion in the course of trial to have the document stricken [R. 139-140]. In a motion to strike the document after trial the trial court again repeated its references to the document as being immaterial and appellant's counsel accepted that result as final. We quote the following from R. 133-134:

"Mr. Altman: In that case, if your Honor finds it is immaterial, why, I have no complaint.

The Court: I didn't predicate my judgment upon that exhibit at all.

Mr. Altman: Upon Exhibit U?

The Court: No.

Mr. Altman: Well, I think that is about it, then, your Honor."

On the same basis that all the divorce proceedings were immaterial the trial Court refused to admit the decree of the Illinois Court in that very divorce proceeding [R. 117-118, 126-127], although the latter document showed very clearly that the alleged partnership, Borin Art Products

Company, was a complete sham [R. 148-152]. The trial court also refused to allow appellant to show the actual settlement agreement between herself and Nathan Borin. As the record shows [R. 112-113], appellant attempted to show, by the attorney who handled the closing stages of her divorce proceeding against Nathan Borin, the actual out-of-court settlement that was made between them, showing the actual claims against him that she made and knew she was making. The fact would have been shown that she herself had no knowledge of any claims supposed to have been made by her of an interest in the alleged partnership [R. 113]. The Court, however, refused to allow that testimony.

That Exhibit U was objectionable is very clear. Not only was it immaterial as the trial Court stated; it was hearsay. It was prepared by attorneys for Nathan Borin, not by attorneys for Claire Borin, who was appellee there and is appellant here [R. 169]. Also, it conflicts with the clear stipulation of the parties in the pretrial conference order that prior to and at the time of the transfer of assets by Borin Art Products Corporation the stock of that corporation was owned entirely by the entity, Borin Art Products Company. The binding effect of that stipulation is shown elsewhere in this brief, at page 22.

The complaint referred to in Exhibit U, moreover, was drawn by appellant's attorneys from documents which she furnished them. She knew nothing about the contents of either those documents or the pleadings which they drew [R. 86, 88, 109, 130]. Also, it is significant here that appellant never advised her attorneys in that proceeding that she was a partner [R. 109]. Indeed, all she did was turn over documents to them, not knowing what they contained [R. 86-88, 110], and signed papers for them,

not knowing what they contained [R. 110, 130]. This fact, which the trial Court itself found [R. 130], is very important. As stated in *Dwyer v. Dwyer*, 265 Ill. App. 155, at 157:

“Allegations in pleadings are sometimes made by the attorneys drawing the pleadings, on a misunderstanding of the facts and not by authority of the party; and this may be shown. First Ruling Case Law, 500, citing *E. & W. T. R. Co. v. De Walt*, 96 Tex. 121, 70 S. W. 531, 97 Am. St. Rep. 877.”

And in *Brooks v. Brooks*, 63 Cal. App. 2d 671, at 675, the California Court gave effect to the party's lack of knowledge of the allegations of a pleading as follows:

“A finding was made ‘that it is true that defendant executed verified statements in the divorce action . . . in which it was stated that at the time of his proposal of marriage to defendant, plaintiff promised and agreed to pay defendant \$80 per month . . . but the Court finds that defendant did not know that said statements were in the said verified statements, and that she signed said statements without knowledge that said statements were contained therein’.”

As stated above, Exhibit 1 was introduced solely for the purpose of showing that appellant's signature thereon was a forgery. Nowhere in the record, absolutely nowhere, except for the said Exhibit 1 and the said Exhibit U, is there any reference to any ownership of stock by appellant. It follows that the record is wholly wanting in any admissible evidence that appellant ever owned any stock of Borin Art Products Corporation.

E. The Trial Court Erred in Failing to Grant Appellant's Motion for New Trial Based on Surprise, and on an Important Admission by Appellee, in Connection With the Question of Ownership of Stock in Borin Art Products Corporation.

In view of the trial Court's continued reference to Exhibit U as immaterial appellant disregarded it, as did the trial Court, until she was faced with a Finding by the trial Court that she had owned eighty shares of stock in Borin Art Products Corporation [R. 60-61]. Thus surprised, appellant first moved that the trial record show the limitation of the pretrial order in respect to the purpose of Exhibit 1 and that Exhibit U be stricken [R. 20-22]. In the hearing on that motion the trial Court again referred to Exhibit U as immaterial and again stated that it had ignored that exhibit [R. 133-134]. The Court denied that motion, however, without stating its reason [R. 58].

Thereafter appellant moved for a new trial [R. 59-65]. The motion was based largely on appellant's surprise at the finding of stock ownership by the Court despite complete absence of anything in the record to support it other than Exhibit 1 introduced only for the purpose of showing that appellant's name thereon was a forgery, and the said Exhibit U which the trial Court stated again and again it wholly disregarded.

The motion for new trial was also based [R. 60] upon the admission made by counsel for appellee, at the hearing on the prior motion, that the eighty shares which it alleged were "owned" by appellant were in effect merely issued in her name without her knowledge "prior to the dissolution of the corporation as part of the scheme for dissolution of the corporation and creating the partnership" [R. 136]. For this purpose appellant attached to the motion for new trial under affidavit two exhibits taken

from the administrative file of appellee. The one exhibit [R. 62-63] filed with the motion thoroughly supports the said admission made by appellee's counsel, and the other exhibit, lodged at the argument on the motion and also taken from appellee's administrative file [R. 69-70], showed that as of December 31, 1942, four months before the dissolution of the corporation, no stock stood in the name of appellant. As stated above appellant filed these two exhibits in support of the admission made by counsel for appellee, although, as we shall show below, such admission was sufficient in itself and needed no support.

That the said admission made by appellee was significant is shown in *Commission v. Tower, supra*. As there shown, ownership of stock set up for the mere purpose of a transfer from a corporation to a family partnership is a mere device and does not establish ownership of such stock for tax purposes. It is likewise shown in this Court's decision in *Jacob, et al. v. Commissioner, supra*, that a formal transfer of stock, where the benefits are retained by the transferor, cannot result in transferee liability.

The said admission by appellee is binding upon it. As stated by the Supreme Court in *Oscanyon v. Winchester Repeating Arms*, 103 U. S. 261, 263, 26 L. Ed. 539:

"Indeed, any fact, bearing upon the issues involved, admitted by counsel may be the ground of the court's procedure as equally as if established by the clearest proof."

This is true also of an admission made after trial. 31 C. J. S. 1137; *The Harry* (D. C., N. Y.) 11 Fed. Cas. No. 6147, 9 Ben. 524.) This is likewise true of an admission made, as here, in the course of a hearing on a motion. (*Steiner v. Nelson* (C. A. 7), *supra*.) This is even

true of admissions made on appeal. (*O. F. Nelson & Co. v. United States* (C. A. 9), 149 F. 2d 692. See also *France Mfg. Co. v. Jefferson Electric Co.*, 106 F. 2d 605, cert. den. 309 U. S. 657, 60 S. Ct. 471, rehear. den., 309 U. S. 696, 60 S. Ct. 589; *New York Evening Post Co. v. Chaloner* (C. A. 2), 265 Fed. 204, cert. dismissed 252 U. S. 577, 40 S. Ct. 396; *Wiget v. Becker* (C. A. 8), 84 F. 2d 706.)

Appellee filed a memorandum in opposition to the motion for new trial [R. 66-68] but nowhere in that memorandum withdrew its admission referred to above or denied any of the facts set forth by appellant in her motion for new trial. In view of these circumstances the new trial certainly should have been granted.

A new trial may be granted in case of surprise. (*United States v. Kralmann* (D. C., Ky., 1943), 3 F. R. D. 473, 475.)

A new trial may be granted to prevent injustice. (*McCracken v. Richmond, F. & R.R. Co.* (C. A. 4, 1957), 240 F. 2d 484.)

A motion for new trial is proper for the purpose of pointing out errors to the trial court and for furnishing a record to the Court of Appeals for review of the trial court's action. (*Fine v. Paramount Pictures* (C. A. 7, 1950), 181 F. 2d 300, 302.)

A motion for new trial may also be made to give the trial court an opportunity to re-examine the entire factual situation and applicable law. (*Miller v. Pacific Mutual Life Ins. Co.* (D. C., Mich., 1954), 17 F. R. D. 121, 125, affirmed 228 F. 2d 889.)

The conclusion is clear, as appellant submits, that the motion for new trial should have been granted.

III.

The Entity Known as “Borin Art Products Company” Was Not in Fact a True and Bona Fide Partnership, as Assumed Necessarily in the Lower Court’s Findings, but Was on the Contrary, as Shown by the Evidence, a Mere Sham and the Alter Ego of Nathan Borin.

The reference under this point is to Findings VI, VIII and IX [R. 49-50], and the implication of these findings in other findings.

A. Appellee Itself Treated the Said Entity as a Sham and the Alter Ego of Nathan Borin as Long as Nathan Borin Was Still Solvent.

As shown by the testimony [R. 120-122], the federal revenue office in Chicago in a conference with appellant told her that they were definitely of the opinion that the entire partnership was a mere dummy set up by Nathan Borin to evade taxes. Also, as it was stipulated by the parties here [R. 13], as late as March 30, 1950, the Treasury Department formally advised the appellant of an overassessment in her individual taxes for the years 1944, 1945, and 1946 based upon the conclusion that the income taxed to her as income from a partnership, Borin Art Products Company, was not her income but that of her husband Nathan Borin. Thereafter, as appellee informed the Court below, the partnership “went flat on its face and they [the purported partners] were held for the corporation taxes” [R. 105].

It is obvious that as long as there was money in the so-called partnership, Borin Art Products Company, the government took the position, clearly upon substantial evidence, and because of the higher tax which would result, that the partnership was a sham and the mere *alter ego*

of Nathan Borin. But after the said partnership went "flat on its face" the government, with collection on the higher tax base a vanishing possibility, reversed its position and attempted to hold that the partnership was valid and its purported members liable for the corporation taxes. This reversal of position by the government is sharply reminiscent of the one made for similar reasons, but blocked by this Court, in *Jacob, et al. v. Commissioner, supra*.

B. Appellee's Own Evidence Shows That the Said Entity Was a Mere Sham and the Alter Ego of Nathan Borin.

Appellee introduced into evidence as Exhibit T a complaint in chancery signed by appellant, by means of which she appeared to seek an accounting of the alleged partnership, Borin Art Products Company, as one of its limited members. We shall deal with that exhibit again, *infra*, in connection with the trial court's use of it as establishing an estoppel against appellant. For the purpose here we refer only to its contents showing on its face that the partnership was but a sham. We quote as follows from the document at R. 161, 162-163, and 164:

"That during all of the time said partnership was in existence the same was entirely under the control, domination and direction of the defendant Nathan Borin; that the books of account of said partnership were maintained by the defendant Locker who acted as comptroller of said enterprise, but that said Locker made entries in the books of account in pursuance of the instructions and directions of the said defendant Borin and of no other person whatsoever.

". . . that in truth and in fact plaintiff [appellant here] has made no such withdrawals but that, at the direction of the defendant, Nathan Borin,

there has been charged to her account on said partnership books numerous items of expense which are in truth and in fact not chargeable to her; that the said defendant Borin, among other things, has charged to the plaintiff's account expenses of the parties in maintaining their household, purchases made for the minor daughter of the parties, items for articles which the said Nathan Borin had bestowed upon the plaintiff as gifts, items consisting of checks made payable to the plaintiff, which were fraudulently endorsed by the defendant, Borin, and by other persons at the direction of the defendant Borin, without the knowledge, consent or authority of the plaintiff, items of traveling expense for the plaintiff and defendant Borin for trips which they took together, items of attorneys' fees, which were the sole obligation of the defendant Borin, items concerning which this plaintiff has no knowledge, loans allegedly made by the defendant to brothers of the plaintiff, items lost by the defendant Borin as a result of playing cards and gambling, items for night club expenses and hotel bills of defendant, Borin and other persons unknown to plaintiff, a bill for a doctor who operated upon the minor child of the parties hereto and numerous other items of similar ilk;

* * * * *

"That defendant Borin has, on numerous occasions during the time that the partnership was in existence, charged as expenses of the partnership sundry amounts which are in truth and in fact directly chargeable to the said defendant; that plaintiff is informed and believes, and upon such information and belief states the fact to be that defendant Borin has charged vast sums of money which he has expended in night clubs, cabarets and other places of entertainment as partnership expenses, when, in fact, they were not; that he has charged numerous items

involving hotel bills for his own personal pleasure to the partnership as expenses; that he has charged the purchase and operation of two Cadillac automobiles to the partnership as firm expenses, when, in fact, they were for the individual use of the defendant Borin; that he has given lavish gifts costing substantial sums of money to various persons and charged the same as an expense of the partnership, when, in truth and in fact, said gifts were made solely for the individual benefit of the defendant Borin; that he has in numerous other ways *utilized the funds of the partnership for his own individual benefit* without charging the same to his individual account; . . .” (Italics supplied.)

Appellant, as the Findings show [R. 55, par. XX], never received anything as a result of the said complaint, Exhibit T. However, that complaint shows that the partnership was the same kind of fiction for tax evasion purposes as was required to be disregarded in *Tower v. Commissioner, supra*, explained in *Culbertson v. Commissioner*, 337 U. S. 733, 69 S. Ct. 1210; *Toor v. Westover* (C. A. 9), 200 F. 2d 713; *Alexander v. Commissioner* (C. A. 5), 194 F. 2d 921; and the numerous other family partnership cases which have come down during the last decade.

As to what constitutes a bona fide partnership it was stated in *Culbertson v. Commissioner, supra*, at 337 U. S. p. 742:

“The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard supposedly established by the Tower case, but whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capi-

tal contributions, *the actual control of income and the purposes for which it is used*, and any other facts throwing light on their true intent—the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise.” (Italics added.)

The same thing is true under the law of Illinois, where this partnership was purportedly created. It was there held in *Schmidt v. Balling*, 91 Ill. App. 388, that whether a partnership exists under a given state of facts is a question of law for the Court and not of fact for the jury. More specifically, it was held in *Cook v. Lauten*, 1 Ill. App. 2d 255, 117 N. E. 2d 414, that where an individual set up a purported partnership with his employee and the effect of the arrangement was nothing but an assignment of future income subject to such individual's right as “managing partner” to “direct [the employee's] withdrawal at his own discretion” that a true partnership did not exist. Essentially the same facts are present here. Thus even under Illinois partnership law the question is proper whether the purported partnership is in fact a true partnership, even though it is called a partnership in an agreement purportedly setting it up.

Moreover, it is established law that the meaning of a document is to be determined in the light of the manner in which it is actually carried out. Thus, in *Helvering v. Tex-Penn Oil Company*, 300 U. S. 481, 493, 57 S. Ct. 569, the Supreme Court stated that the validity of a finding “is to be tested by what in fact was done rather than by the mere form of words used and the writings employed.”

Here, of course, appellant did not join in the enterprise at all; her name was forged on the purported partnership agreement. As the evidence above cited shows, more-

over, the so-called partners other than Nathan Borin were actually dummies. There was no good faith, no joining together, no present conduct by persons joined together. The "partnership" was, as appellee's counsel admitted in open court, an element in a "scheme" [R. 136].

C. The Exemplified Copy of a Decree of Divorce Which Appellant Offered for the Purpose of Showing That the Superior Court of Illinois Had in Effect Found the Partnership Nothing but a Sham Should Have Been Admitted.

For the purpose of showing the character of the alleged partnership, Borin Art Products Company, appellant offered in evidence an exemplified copy of a decree of the Superior Court of Cook County, Illinois, in the very proceeding which appellee's Exhibit U involved [R. 117-118, 125-126]. That decree, being Exhibit 12 for identification [R. 148-152], made no reference to any ownership of stock by appellant. On the contrary, it showed that Nathan Borin owned all the assets and appellant nothing. It stated that Nathan Borin withdrew from the Borin Art Products Company between April 1, 1944, and October 31, 1947, the sum of \$118,120.52, and this "in addition to" \$69,285.64 for the year 1945, \$75,563.82 for the year 1946, and \$65,911.45 for the year 1947, or a grand total for the three and one-half year period of \$328,881.43, but that appellant did not even have the means to employ counsel to represent her [R. 151].

Thus that decree confirms the fact that Nathan Borin used the so-called partnership for his own individual purposes and that it was nothing but his *alter ego*. The Court below nevertheless refused to admit the document on the ground that it was in a divorce proceeding [R. 117-118, 125-126]. Appellant submits that it should have been admitted.

D. Even the Document Entitled "Agreement" Introduced by Appellant as Exhibit 1 for the Purpose Only of Showing That Appellant's Signature Thereon Was a Forgery Shows on Its Face That the Partnership Was Not Intended to Be Anything but a Sham and That the Interest Purportedly Received by Appellant in the Said Partnership Was Not in Fact a True or Bona Fide Interest.

1.

As the so-called agreement [R. 140-147] shows, Nathan Borin as "general partner" was given the authority to terminate the partnership at any time on six months notice [R. 143]. No corresponding power was given to any of the other partners. The interest of the limited partners was not transferable [R. 146], and Nathan Borin as general partner had the absolute right to purchase the interest of any limited partner at any time at book value [R. 147]. These precisely were the determining circumstances in the *Toor* case, *supra*, decided by this Court.

A salary is shown in the partnership agreement for appellant. The evidence is clear, however, that appellant was never an employee of Borin Art Products Company and never rendered any services to it [R. 93-94, 109, 122]. Salaries were also specified for the other so-called limited partners [R. 145] but it was provided that they could not receive them unless they were actively engaged in the partnership business and Nathan Borin reserved the power to discharge any one of them at any time, with or without cause [R. 146-147], and then, as above observed, repurchase the said employee's interest in the partnership at book value. There is a sentence which refers to "Further provision for the distribution of profits" [R. 146] but no such profits were ever distributed to appellant, as the Court below found [R. 55, par. XX], nor to any

other so-called limited partner, as appellee itself admitted [R. 105]. Nevertheless, Nathan Borin, according to appellee's own evidence, Exhibit T quoted above, withdrew large sums from the partnership. As further pointed out above, during a three and one-half year period he withdrew a total of \$328,881.43. Thus, as the so-called partnership agreement was actually carried out, the so-called limited partners were nothing but employees, except for appellant who was not even that, and the distribution of profits made was entirely to Nathan Borin.

No more complete a fiction could have been devised than the so-called Borin Art Products Company. That for tax purposes such an entity could not be recognized is clear under the cases cited above. Under those cases there was no partnership but merely Nathan Borin doing business as Borin Art Products Company.

2.

The so-called agreement also indicates [R. 147, par. (20)] just how the scheme of dissolving the corporation and forming the partnership was enacted. Fictional transfers of stock were made, at specified prices, and Nathan Borin was to have a lien on any and all the profits of the partnership thereupon formed until those prices were paid. The partnership interests were also, as pointed out above, repurchasable by Nathan Borin, at any time, at book value, subject, of course, to the amount of such lien. Thus what happened, taking the document itself at face value, was a mere assignment of certain future income.

Looking outside the purported partnership agreement for a moment, the record does not show whether any of the stock resulting from the transfers referred to was ever delivered. Certainly none of it was delivered to

appellant. She was just never told about it [R. 85, 89]. Nor does the record show whether any part of the said purchase prices for the stock was ever paid. Certainly none was ever paid by appellant [R. 85]. The record does not even show whether any obligation to pay said prices was ever created.

The record does show, however, that nothing was ever paid to the so-called limited partners. Apparently, as appellee's evidence shows, the partnership plant burned down on January 10, 1946 [R. 160-161], but insurance in a total amount of \$900,000.00 was paid [R. 105]. Appellant, however, never received anything, as the Court below found; nor did any of the others listed in the so-called agreement as limited partners, as appellee has conceded [R. 105]. Nevertheless, Nathan Borin, as already observed, withdrew several hundred thousand dollars from the partnership.

Taking the purported partnership agreement by itself, moreover, even without viewing the manner in which it was carried out, the alleged partnership interests just never came into existence. A transfer of property is not recognized for tax purposes unless the transfer is real and there is no contract, option or plan to repurchase. This has been held true where the transfer is in form a sale and a deduction for losses is involved. (5 Mertens, Sec. 28.28, p. 84; *Powell v. Commissioner* (1936), 34 B. T. A. 655; *Charles E. Mitchell v. Commissioner*, 32 B. T. A. 1093, affirmed (C. A. 2, 1937), 89 F. 2d 873; *Shoenberg v. Commissioner* (C. A. 8, 1935), 77 F. 2d 446, cert. den. 296 U. S. 586, 56 S. Ct. 101; *Commissioner v. Neaves* (C. A. 9, 1936), 81 F. 2d 947; *Foster v. Commissioner* (C. A. 2, 1938), 96 F. 2d 130; *Dupont v. Commissioner* (C. A. 3, 1941), 118 F. 2d 544.) The

same principle has been recognized in the case of voluntary transfers in connection with gift and estate taxes. Where a transfer is subject to a right to retake or reacquire it is incomplete. (*Reinecke v. Northern Trust Co.* (1929), 278 U. S. 339, 49 S. Ct. 123; *Helvering v. City Bank Farmers Trust Co.* (1936), 296 U. S. 85, 56 S. Ct. 70; *Helvering v. Stevens* (1936), 297 U. S. 693, 56 S. Ct. 443; *Burnet v. Guggenheim* (1933), 288 U. S. 280, 53 S. Ct. 369; *Sanford v. Commissioner* (1939), 308 U. S. 39, 60 S. Ct. 51; *Raskin v. Humphreys* (1939), 308 U. S. 54, 60 S. Ct. 60.)

The same point has been made in connection with voluntary transfers involved in income taxes. In such a case, *Corliss v. Bowers, Collector* (1930), 281 U. S. 376, 50 S. Ct. 336, the Supreme Court stated:

“But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid.”

The same principle has been expressly applied by this Court in the case of creation of partnership interests. (*Toor v. Westover, supra.*)

Thus it is immaterial what tax is involved and whether the transfer is in form a voluntary transfer or one made for consideration. If the transfer is subject to a right to retake, or even a plan to reacquire, the transfer is not recognized for tax purposes.

It is also a general rule that any transfer even though valid is not recognized for tax purposes if it amounts in effect to a mere assignment of future income. (*Lucas v. Earl* (1930), 281 U. S. 11, 50 S. Ct. 184; *Helvering v. Clifford* (1939), 309 U. S. 331, 60 S. Ct. 554.)

It must follow that the alleged limited partnership interests, including that of appellant, just never came into existence.

E. Finally, the Trial Court Itself Regarded the Partnership as a Sham.

The trial court stated [R. 115]:

“I am satisfied, Mr. Altman, that *Mr. Borin treated this partnership as his own business*. He didn’t ask his wife anything about it. He didn’t pay her any dividends. He didn’t give her anything. She didn’t get anything out of it.” (Italics added.)

And at R. 119:

“If I was deciding this thing in the first instance, I am rather doubtful I would find there is a partnership . . .

“But, however, even though there may not be a partnership, the plaintiff here, the taxpayer, assumed there was a partnership, acted as if there was a partnership”

Thus the trial court itself regarded the partnership as a sham. It recognized the partnership in this proceeding only on the basis of some rule of estoppel. We shall deal with the subject of estoppel under Point V, *infra*.

IV.

The Trial Court's Findings (a) That Appellant Received a 10 Per Cent Interest in the Alleged Partnership, Borin Art Products Company, (b) That Said Interest Was Worth \$12,000.00, and (c) That It Was Received "for" an Interest of Eighty (80) Shares in Said Corporation, Are Contrary to the Evidence and Also Inadequate.

The reference under this Point is to Findings VII and IX, R. 49, 50.

A. Appellant Never Received Any Such Interest at All.

The evidence is clear, as pointed out above, pages 15, 16 and 19, that appellant's name was not only inserted on the so-called partnership agreement by someone else without her authority, as the Court below found, but that it was made to simulate her signature and was therefore an actual forgery. It is obvious that there was no intent to deliver any interest to her and that her name was used thereon merely as a tax-reducing device.

Also, as fully detailed above under Point III, the partnership itself was a fiction so that the interest purportedly received by her under the document entitled "Agreement" was not in fact a true or bona fide interest in anything. Also, as shown above under Point III, Nathan Borin drew a total of \$328,881.43 out of that business in a three and one-half year period while appellant, as the Court found, received nothing, just nothing at all.

We have already cited authority, pages 20, 35 above, to the effect that what is actually done governs the treatment for tax purposes, that a document is to be interpreted in the light of the manner in which it was actually carried out. What was actually done here by Nathan Borin was a scheme, a device, a deception.

Indeed, as we shall show under Point V, *infra*, the trial court based its conclusion that appellant had received a partnership interest, not at all upon any evidence showing that she had in fact received it, but upon estoppel.

B. There Is No Finding of the Actual Value of the Said Interest, and Such a Finding Is Necessary to Support Transferee Liability.

The Findings [R. 55, Fndg. XXI] refer to an “agreed value”. The term “agreed” is taken from the alleged partnership agreement [R. 143-144]. That, of course, is the document on which appellant’s name was forged. Nowhere in the record is there anything to show an agreement between the parties to *this* proceeding as to the value of the alleged partnership interest involved.

What must be shown, in any case, is the *actual* value of that which appellant received, if anything. (*Phillips v. Commissioner, supra*; *Phillips-Jones Corporation, et al. v. Parmley, supra*.) There is, nevertheless, no finding by the Court below of the actual value of said purported interest. As shown above under Point I, moreover, the burden was upon appellee to show such value.

Besides, under the express terms of the purported partnership agreement [R. 147], the said interest, if any, was subject to a lien for any amount due the “general partner”, that is, Nathan Borin, in respect of the stock purportedly transferred to appellant. It may be assumed that this was the \$12,000.00 amount shown in the document [R. 144]. Since the Findings show clearly that she never received anything from the partnership [R. 55] it would appear that the paper interest set up in her name in this forged document was at all times subject to a lien in favor of Nathan Borin for the full amount of the “agreed value”

of \$12,000.00. It would follow that the net interest, if anything, received by her was zero.

Also, as the purported partnership agreement shows, the assets were to be transferred to the partnership "after payment of all just debts" [R. 142]. The instrument does not show what those debts are. Of course, they would include taxes due to the United States, not only the taxes involved here, which are for the years 1942 and 1943, but also any taxes for other years which had not been paid at the time of the transfer of assets by the corporation.

Deficiencies for 1940 and 1941, years not involved here, were determined *after* the transfer of assets [R. 13, par. 13*]. From the fact that the amount of \$12,000.00 was also assessed against appellant in connection with the years 1940 and 1941, and the further fact that the taxes for those years were eventually paid [R. 13, par. 13], it must be that there were actual deficiencies for 1940 and 1941, determined after the transfer of assets involved, which were in the full amount of the "agreed value" shown in the partnership agreement. It would follow from this also that the value of the interest shown under appellant's name in that document was in any case zero and this without giving effect to the corporate tax deficiencies involved here for the years 1942 and 1943.

C. Since Appellant in Any Case Did Not Receive Such an Interest From the Corporation She Is Not Liable as a Transferee.

There is no Finding whatever that appellant ever received anything from the alleged transferor, Borin Art Products Corporation. As the pretrial stipulation ex-

*See correction of par. 13 at R. 80.

pressly shows [R. 12], the stock was owned by the alleged partnership prior to the transfer of assets to it by the corporation. In other words, if any interest in the partnership was received in exchange for stock, it was so received prior to the transfer of assets by the corporation, and from the partnership, not from the corporation. There is nothing whatever in the Findings to the contrary. As the cases cited above under Point II A, at pages 21, 22, show, unless what appellant received was received by her from the corporation it cannot support transferee liability. It follows that the Findings themselves fail to support the conclusions of law and the judgment, in that they do not show the receipt of anything by appellant from the transferor, Borin Art Products Corporation.

V.

The Court's Finding That "Subsequent to the Execution of the Partnership Agreement, She [Appellant] Recognized and Ratified the Partnership Agreement, and Became Obligated Thereunder, as Fully as Though She Had Personally Placed Her Signature Thereon at the Time of Its Execution" Is Contrary to the Evidence; the Court's Finding of Liability Was Based Entirely on Estoppel.

The reference here is to Finding XVI, R. 53. A Conclusion of Law in substantially the same language is shown in Paragraph III, R. 56.

A. There Is No Evidence Anywhere in the Record of a Ratification of the Partnership Agreement by Appellant.

1.

The agreement referred to, Exhibit 1, is shown in the record at R. 140-147. Since appellant's signature on the said agreement was a forgery, ratification as distinguished from estoppel has no application here.

It is well settled that ratification of a forgery is subject to much narrower restrictions than ratification in general. (2 C. J. S. 1076.) In the case of a forged instrument a principal may become liable if his action induces the other party to change his position to his prejudice. "The rule in such case rests, however, on the doctrine of estoppel rather than that of ratification." 2 C. J. S. 1077, citing cases from numerous jurisdictions, including *Hefner v. Dawson*, 63 Ill. 403, 14 Am. Rep. 123. In *Chicago Edison Co. v. Fay*, 164 Ill. 323, 329, 45 N. E. 534, a contention that a forged instrument was ratified was rejected where the principal had not received "any such benefit . . . as to impose liability on him." To the same effect, *Mruk v. Chicago Title and Trust Co.*, 328 Ill. App. 402, 66 N. E. 2d 478. Here, of course, appellant never received any benefits [R. 132]. Even the Findings show this. Clearly then there was no ratification, as distinguished from estoppel, here.

2.

It is also true that the principle of ratification does not apply except where the person ratifying had full knowledge of all the facts. (2 C. J. S. 1081, *et seq.*) Here, of course, appellant, as already shown in this brief, had no knowledge of any of the facts. All she did was turn documents that she found, without any knowledge of their contents, over to her attorneys in connection with a divorce action, two years after the purported partnership was set up [R. 86, 88, 109, 110]. Since appellant never told her attorneys that she was a partner [R. 109], all that even the attorneys knew was what they found in those documents. Clearly the pleadings which they prepared, which she herself did not understand [R. 97-98], did not amount to a ratification by her. (*Dwyer v. Dwyer*, *supra*.)

3.

The term ratification has sometimes been used to mean estoppel. (2 C. J. S. Sec. 1070.)

It may be that that is what the Court below meant, since the Court stated expressly that it was basing its determination on the acts of appellant after the date of the alleged partnership agreement. The Court stated, as already quoted above [R. 119]:

“If I was deciding this thing in the first instance, I am rather doubtful I would find there is a partnership. . . .

But, however, even though there may not be a partnership, the plaintiff here, the taxpayer, assumed there was a partnership, acted as if there was a partnership. . . .”

The Court also stated there:

“I would not find that the plaintiff in this action was bound by the partnership agreement under the evidence before me unless it had been for her actions after the date of the agreement.”

The Court further stated [R. 130]:

“It seems to me that Mrs. Borin is now *estopped* from denying the partnership, although if it hadn't been for her subsequent acts and conduct, I would feel she was not liable, but I am basing my opinion purely on the actions of Mrs. Borin. . . . I feel sorry for Mrs. Borin because I don't think she knew what was going on. . . .” (Italics added.)

“I would like the findings to contain the express finding that I am finding Mrs. Borin liable because of her conduct subsequent to the first day of May, 1943. I think because of her conduct she is now *estopped* from denying that there was a partnership.” (Italics added.)

At another point also the Court expressly stated that because of her actions to terminate the partnership agreement and for an accounting she was “estopped” from denying the partnership [R. 135-136].

Thus what we have before us is not a matter of simple ratification but a question of estoppel.

B. There Is Not a Single Item of Evidence Here to Support an Estoppel.

1.

The trial court, as above indicated, based its conclusion of estoppel entirely or primarily upon Exhibit T, a complaint in chancery signed by appellant which sought a termination of the partnership agreement and an accounting. The complaint was admitted over appellant’s objections [R. 128]. Its principal clauses are shown in the record at R. 159-168 and a single paragraph of it is quoted in Finding XVII [R. 53-54].

This complaint was drawn by appellant’s attorneys from documents given to them [R. 97, 110]. If Exhibit 1, the purported partnership agreement, was one of those documents, it was a document she never knew anything about [R. 93]. Nor did she ever tell her attorneys that she was a partner [R. 109, 113]. She thought only that they were protecting her interests in connection with the divorce [R. 97-98], and signed complaints in reliance upon them [R. 109].

Apparently the complaint was only in aid of the divorce proceeding. Indeed, appellee was unable to show that the complaint was ever prosecuted [R. 101]. The Court’s Findings show clearly also that she never received anything [R. 55, Fndg. XX]. In fact, appellee admitted in open court that she never got anything [R. 105]. The

question therefore remains as to whether the mere execution of that complaint supports an estoppel against her denial of the fact alleged in that complaint that there was a partnership and that she was a member thereof.

As the Court below pointed out, the document is incomplete on its face [R. 99]. A mere complaint, moreover, under Illinois law does not bind the pleader but is intended merely to frame the issues. A litigant there may at any time before final judgment amend his pleading, and may even amend it after judgment, to conform to the proof. (Smith-Hurd Illinois Annotated Statutes, Civil Practice Act, Chap. 110, Sec. 46(3); *Wiedow v. Carpenter* (1941), 310 Ill. App. 342, 34 N. E. 2d 83; see *McCartney v. McCartney* (1956), 8 Ill. 2d 494, 134 N. E. 2d 789.)

Furthermore, as shown above, pages 32-34, this very Exhibit T upon which the Court based an estoppel shows on its face that the partnership was a mere sham and the *alter ego* of Nathan Borin.

Whether or not Exhibit T constituted admissible evidence, it certainly does not support an estoppel. As the Court below found, appellant never received anything from either the corporation or the partnership [R. 50, 55, Fndgs. IX, XX]; there was no benefit received and accepted by her [R. 132]. Nor does the record show that appellee ever relied upon the said Exhibit T, or upon any other document, act or representation to its detriment.

The essential elements of estoppel are summarized by this Court in *California State Board of Equalization v. Coast Radio Products* (C. A. 9, 1955), 228 F. 2d 520, 525, as follows:

“Four elements are necessary: (1) the party to be estopped must know the facts; (2) he must intend

that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury." (See, also, 31 C. J. S. 254 (Sec. 67), 349 (Sec. 109b).)

These principles apply where estoppel is asserted on the basis of a pleading. (*General Petroleum Corporation v. Daugherty* (C. A. 9), 117 F. 2d 529, 535.)

Also, the burden of proving those elements of estoppel are always upon the party asserting it. (*Coen v. American Surety Co. of New York* (C. A. 8), 120 F. 2d 393, 31 C. J. S. 454, *cert. den.*, 314 U. S. 667, 62 S. Ct. 128.)

As the doctrine of estoppel rests on equity, a party is not estopped where the equities are in his favor. (31 C. J. S., Estoppel, Sec. 108, p. 346.) The foundation of equitable estoppel is in justice and good conscience. (2 Pom. Eq. Jur. 802; *Rothschild v. Title Guarantee and Trust Company*, 204 N. Y. 458, 97 N. E. 879; *Wheelock v. Commissioner* (C. A. 5, 1935), 77 F. 2d 474.) Here the Court below stated again and again that the equities were in appellant's favor [R. 105-106, 132], and appellee openly admitted that this is a "harsh case" [R. 108].

It must be borne in mind also that the liability of a transferee is based upon the trust fund doctrine. It is a proceeding in equity. (*Phillips v. Commissioner, supra*; *Phillips-Jones Corporation, et al. v. Parmley, supra*, 302 U. S. at 235-236.)

2.

The Court below also made some reference to a claim for refund filed with the revenue office [R. 129-130]. The body of the claim is set out at R. 172. It is clear that

the claim was not based upon any contention by appellant that she was a bona fide limited partner in Borin Art Products Company. On the contrary, the basis of the claim is that she was not such a partner and that she was merely so designated for tax purposes by her then husband, Nathan Borin.

Besides, there was attached to the claim the letter from the government dated March 30, 1950, covered by the pre-trial order [R. 13]. There were in fact three such claims, Government Exhibits W, X, and Y [R. 122-123], for the years and in the amounts shown in the said letter of March 30, 1950. The letter was attached to the first of these claims but all three claims were filed at the same time together with the said letter.*

In the first place, appellant signed these claims at the request of her attorney or accountant without knowing what they were about [R. 122-124]. She did not even know whether the amounts shown were ever paid. She just signed the papers at her accountant's request [R. 124-125]. In the second place, it is clear from the said letter of March 30, 1950, attached to the first of these claims, Exhibit W, that these claims were based upon the formal representation by the government that appellant was entitled to the amounts shown. What the government obviously intended by that letter was to offset over-

*Because of the reference to the letter in the pretrial order appellant failed to request that it be printed as a part of Government's Exhibit W. It is a part of the unprinted record in this Court. The inclusion of the said letter as a part of that exhibit was specifically requested in the "Second Amendment to Designation of Contents of Record on Appeal" filed by appellant but the clerk's certificate [R. 78] fails to show that fact in reference to the said exhibit. Appellant will ask for its printing if the court or appellee so suggests.

assessments in favor of appellant against deficiencies against Nathan Borin. Only appellant could have filed these claims, even though they were to be so offset. (I. R. C. 1939, Sec. 322(b)(1), 10 Mertens Sec. 58.05.) In effect then the filing of these claims was induced by the government for its own benefit.

There is no indication anywhere that these claims were filed for any other purpose, that appellant actually intended to collect any money by means of them, that the government ever paid any money out by means of them, or in reliance on said claim or claims. As the record shows, moreover, appellant offered to waive the said claims [R. 125].

There is nothing whatever in the said claim or claims to support an estoppel. On the contrary they show on their face that the partnership was a sham.

3.

The Court below also made a general reference to "certain papers that she [appellant] filed with the Internal Revenue Department." Apparently the Court there had reference to the extensions of time referred to in Finding X [R. 50], and to the so-called "Transferee agreement" set out in Finding XI [R. 50-51].

As to the transferee agreements referred to in Finding XI, which appellant signed like the many other documents at the request of her accountant without knowing what they were [R. 130], these documents, admitted into evidence over appellant's objections [R. 127-128], were agreements recognizing that appellant was the transferee "to the extent of her liability as a transferee under the Internal Revenue Code" [R. 51]. But that is the very

liability which is here in question. Obviously then this document merely begs the question.

Moreover, the document says "In consideration of the Commissioner of Internal Revenue not issuing a statutory notice of deficiency to and making an assessment against Borin Art Products Corporation" [R. 50-51]. But the Commissioner did make such an assessment [R. 49, Fndg. V] for the years there involved. Obviously then, if this transferee agreement was an agreement, then the Commissioner violated it and certainly is not in a position here to rely upon it.

By the same token the final sentence of Finding XI [R. 51] is clearly contrary to the evidence. The evidence does not show a single thing which the Commissioner did in reliance upon those documents. On the contrary, since he disregarded these "transferee agreements" and made the assessment, then certainly he did not rely upon them. Furthermore, while the said "transferee agreements" are dated February 8, 1946 [R. 50-51], the Commissioner ruled, as late as March 30, 1950 [R. 13], that appellant was not a member of the partnership and that her so-called interest was in fact owned by Nathan Borin. Plainly the final sentence of Finding XI is contrary to completely uncontradicted evidence.

We submit also that for one not lettered in the law and unfamiliar with business practices [R. 109] these documents do not speak for themselves.

As to the extensions of time referred to in Finding X [R. 50], certainly they constitute no support for an estoppel, or even evidence of anything. They are extensions of the time in which things are to be determined. They are not determinations within themselves. Certainly a mere

agreement to an extension of time for assessment is not recognition of the liability alleged by the government. This completely begs the question.*

Lastly, as to the partnership returns, Exhibits P, Q, R, and S [R. 155-158], introduced by appellee over appellant's objections [R. 97, 128], they were not, as the record cited shows, put in through any witness, or in any proper way identified, and there is nothing whatever on them to show that appellant ever knew that they even existed. Clearly they are the sheerest form of hearsay.

Appellee by requesting the inclusion of those returns as a part of the printed record here, and by including in the Findings the extension of time and "transferee agreements" referred to above, apparently considered them essential to the judgment. We submit that the admission of any and all of these various documents was reversible error.

C. Estoppel Requires That It Must Be Pleaded by the Person Asserting It and There Is No Such Pleading Here.

Estoppel must be pleaded by the person asserting it. (*Bowles v. Capital Packing Co.* (C. A. 10), 143 F. 2d 87; *Strouhal v. Allied Development Co.* (C. A. 10), 220 F. 2d 541, 544.) There is no such pleading here. For this reason, as well as the others cited above, it follows of necessity that estoppel cannot be applied here.

*The waiver form shown in Finding XII [R. 52], which appellant was led to believe was also a mere extension of time, is fully covered above, pp. 16-17.

VI.

Appellee Failed to Plead, or Offer Any Proof, That the Taxes of the Alleged Transferor Had Not Been Paid, and There Is No Finding of Such Nonpayment.

A. For This Purpose It Was Incumbent Upon the Government to Allege and Prove Nonpayment of the Tax of the Alleged Transferor, Borin Art Products Corporation, and No Such Allegation or Proof Was Made.

The assessment against a transferee is not limited to such transferee's pro rata share of tax. The Commissioner may assess each transferee to the full extent of the amount received by him, even though the total thus assessed against all of the transferees exceeds the full amount of the transferor's liability. (*Phillips v. Commissioner, supra.*)

Of course, the Commissioner may not collect from all of the transferees more than the full amount of the transferor's liability. (*Phillips-Jones Corporation v. Parmley, supra*, 302 U. S. at 237.) It necessarily follows that there must be allegation and proof, not only of the value of the assets transferred, but also that, *regardless of whether the assessment against the particular transferee has been paid or not*, the transferor's indebtedness in respect to which the assessment was made has not already been paid. (9 Mertens, Sec. 53.25.)

Here, however, there is neither allegation nor proof, nor even a Finding, that the taxes of the alleged transferor remain unpaid.

The lower court did find [R. 53] that "No part of any of said unpaid balances has been paid." The reference is, however, to the assessment against appellant. As *Phillips v. Commissioner, supra*, shows, it may have assessed the

full amount of the tax against each and every one of the alleged transferees. It would be enough if payments by the others aggregated the tax liability of the transferor. There is certainly no need of specific payment of the liability asserted against appellant.

Thus we have neither allegation nor proof nor a Finding that the taxes of the transferor have not been paid. Indeed, appellee at the trial made it clear that it had no knowledge on this subject [R. 104]. The colloquy referred to is the following:

“The Court: May I inquire, have you collected taxes from the other members of the partnership?

Mr. Messer: I do not know that, your Honor. That was in Chicago. That is not part of the Government’s case.”

Nor is it here merely a matter of speculative possibility. As the record shows, taxes of the corporation for 1940 and 1941 were paid, after its dissolution, by persons other than appellant [R. 13]. There is no reason to suppose that the same thing could not have happened for the years involved here, 1942 and 1943. Certainly these are facts which the government could prove, and at the same time facts which would not ordinarily be in the knowledge of appellant.

It follows for this reason alone that the judgment below is unsupported by the record.

VII.

Appellant Was at Most a Limited Partner and a Limited Partner Under the Law of Illinois Is Not Liable for Any of the Debts of the Partnership.

As the Findings show, the assets of the corporation were transferred directly to the alleged partnership, Borin Art Products Company [R. 49, Fndg. VI]. Appellant had no part in any way in the transfer [R. 53, Fndg. XVI]. Indeed, her signature on the so-called partnership agreement was forged [R. 81-83]. What the Findings state is that appellant, because of *subsequent* acts, became a *limited* partner in the said entity [R. 49-50, Fndg. VIII; R. 53, Fndg. XVI].

As pointed out above under Point I, page 18, appellant's obligation, if any, is determined under the law of the State of Illinois. Assuming then that she was a limited partner, what is her liability? A limited partner under Illinois law, as is also true under the law of California and most other states, is liable only to the extent of his investment; that is, his investment can be lost but no additional amount can be collected from him. (Smith-Hurd Ill. Ann. Stat., Chap. 106½, Secs. 44, 60(1), (4); Illinois Law and Practice, Vol. 29, Partnerships, Sec. 303; *In re Marcuse & Co.* (C. A. 7), 281 Fed. 929, affirmed in *Giles v. Vette*, 263 U. S. 553, 44 S. Ct. 157; *Henningson v. Howard*, 117 Cal. App. 2d 352.)

It follows clearly that by no possibility and even under the factual pattern asserted by appellee could any amount be collected from appellant here.

VIII.

If Appellant Did Receive Any Assets as a Transferee Her Resulting Liability Was Exhausted by the Payments Made on an Assessment Against Her for the Corporate Taxes of Years Prior to Those Here Involved.

It was stipulated in the pretrial conference order [R. 13] that an assessment was made against appellant in the amount of \$12,000.00 as alleged transferee of Borin Art Products Corporation in respect of its income and excess profits taxes for the years 1940 and 1941, because of the distribution upon dissolution of said corporation. It is also there stipulated that the said assessment was subsequently paid, albeit by persons other than appellant.

A person's liability may of course be liquidated by payment by others as well as by a payment by himself. (*Philips-Jones Corporation v. Parmley, supra.*)

It is clear then that if appellant was liable as a transferee to the extent of \$12,000.00, as the Court below has found, then that liability was liquidated by the said payment on taxes for 1940 and 1941.

Conclusion.

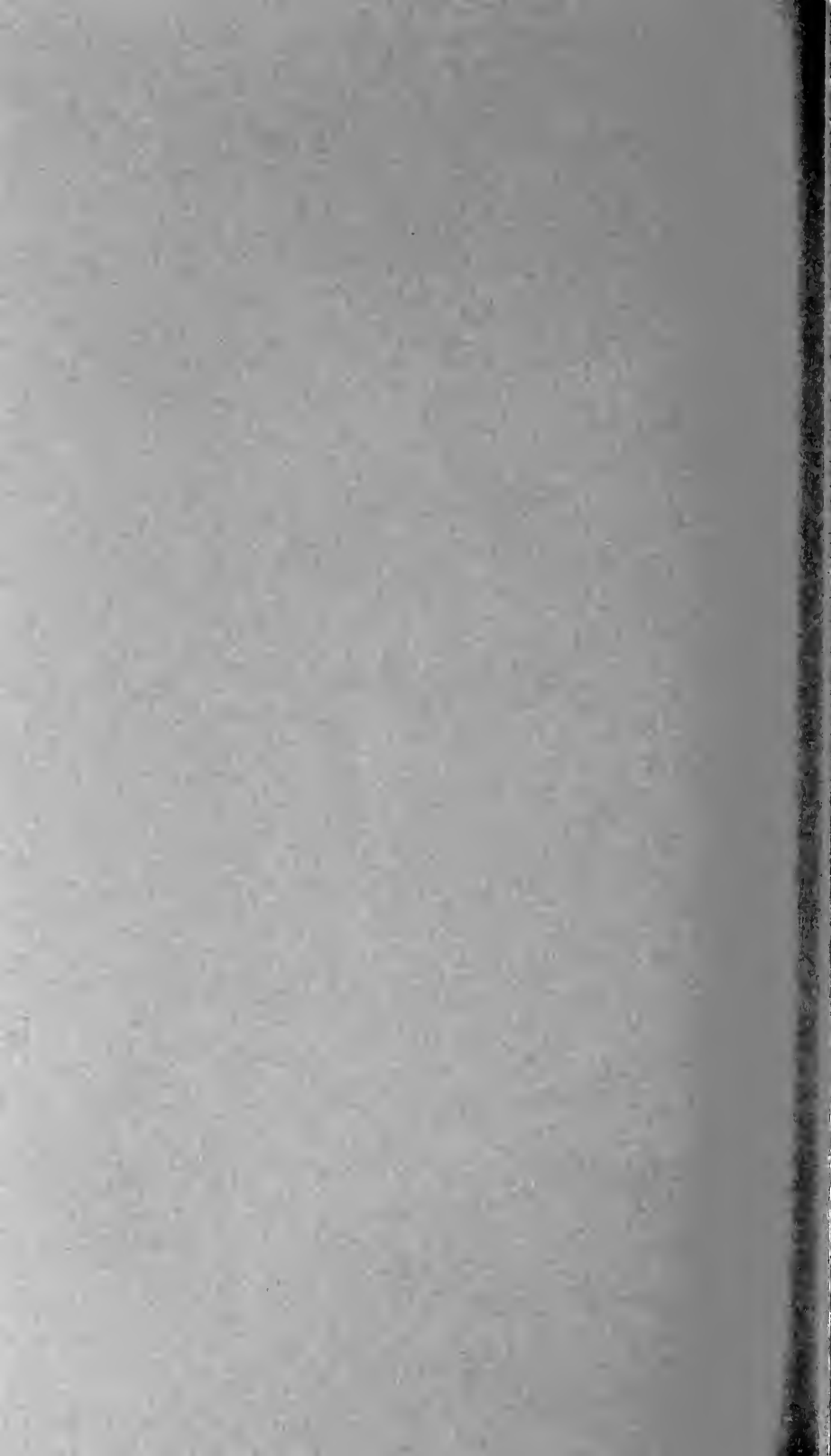
In conclusion, appellant submits that the judgment entered below was erroneous, and that appellant is not liable as a transferee of Borin Art Products Corporation.

Respectfully submitted,

GEORGE T. ALTMAN,

Attorney for Appellant.





APPENDIX.

I. R. C. 1939.

Section 272. PROCEDURE IN GENERAL.

(a)(1) Petition to Board of Tax Appeals.—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. . . .

(d) Waiver of Restrictions.—The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

Section 311. TRANSFERRED ASSETS.

(a) Method of Collection.—The amounts of the following liabilities shall, except as hereinafter in this section

provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of deficiency in a tax imposed by this chapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) Transferees.—The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter.

Section 322. REFUNDS AND CREDITS.

(b) Limitation on Allowance.—

(1) Period of Limitation.—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. . . .

SMITH-HURD ILL. ANNOTATED STATS., CHAPTER 106½.

Section 44. Definition of Limited Partnership.

A limited partnership is a partnership formed by two or more persons under the provisions of Section 2, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership.

Sec. 60. Liability of Limited Partner to Partnership—
Waiver or Compromise of Liabilities.

- (1) A limited partner is liable to the partnership
 - (a) For the difference between his contribution as actually made and that stated in the certificate as having been made, and
 - (b) For any unpaid contribution which he agreed in the certificate to make. . . .
- (4) When a contributor has rightfully received the return in whole or in part of the capital of his contribution, he is nevertheless liable to the partnership for any sum not in excess of such return with interest, necessary to discharge its liabilities to all creditors who extended credit or whose claims arose before such return.

Smith-Hurd Ill. Annotated Stats., Chapter 110.

Section 46. Amendments.

- (3) A pleading may be amended at any time before or after judgment, to conform the pleading to the proofs, upon terms as to costs and continuance that may be just. Illinois Rev. Stats., 1957 Ed., Chapter 32.

Section 157.75. Election to Dissolve Voluntarily by
Consent of Shareholders.

A corporation may elect to dissolve voluntarily and wind up its affairs by the written consent of the holders of record of all of its outstanding shares, in the following manner:

Upon the execution of such written consent by all the shareholders of record, a statement of intent to dissolve shall be executed in duplicate by the corporation by its president or a vice-president, and verified by him, and the

corporate seal shall be thereto affixed, attested by the secretary or assistant secretary, which shall set forth and contain:

* * * * *

(d) The agreement signed by all shareholders of record of the corporation consenting to its dissolution.

(e) That such agreement is signed by all shareholders of record of the corporation or signed in their names by their attorneys thereunto duly authorized.

Section 157.76. Election to Dissolve Voluntarily by act of corporation.

A corporation may elect to dissolve voluntarily and wind up its affairs by the act of the corporation in the following manner:

(a) The board of directors shall adopt a resolution recommending that the corporation be dissolved voluntarily, and directing that the question of such dissolution be submitted to a vote at a meeting of shareholders which may be either an annual or special meeting.

(b) Written or printed notice stating that the purpose, or one of the purposes, of such meeting is to consider the advisability of voluntarily dissolving the corporation, shall be given to each shareholder of record entitled to vote at such meeting within the time and in the manner provided in this Act for the giving of notice of meetings of shareholders. If such meeting be an annual meeting such purpose may be included in the notice of such annual meeting.

No. 15963

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLAIRE B. MORSE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

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DEC 27 1958

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No. 15963

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLAIRE B. MORSE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

Opinion Below.

The findings of fact and conclusions of law of the District Court [R. 47-57] are not officially reported.

Jurisdiction.

This appeal involves transferee liability for unpaid corporate income and excess profits taxes which were assessed for the calendar year 1942 and for the period January 1, 1943, through April 30, 1943. [R. 12, 48-49, 53.] The appellant, who is a transferee, and hereinafter referred to as the taxpayer, commenced a suit to enjoin the District Director from collecting the assessed tax. [R. 48.] The United States intervened under the

authority of Section 7401, Internal Revenue Code of 1954, to recover the assessed taxes from the taxpayer. [R. 48.]¹ Jurisdiction was conferred on the District Court under 28 U. S. C., Sections 1340 and 1345. The judgment of the District Court was entered on February 17, 1958. [R. 58.] Within sixty days, or on March 7, 1958, taxpayer's notice of appeal was filed. [R. 71.] Jurisdiction is conferred on this Court under 28 U. S. C., Section 1291.

Question Presented.

Whether taxpayer is liable as a transferee under Section 311, Internal Revenue Code of 1939, where in an exchange for her corporate stock she received, in accordance with a partnership agreement which she ratified, a 10% interest in the partnership to which all the corporate assets were transferred.

Statute and Regulations Involved.

Internal Revenue Code of 1939:

SEC. 311. TRANSFERRED ASSETS.

(a) *Method of Collection.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) *Transferees.*—The liability, at law or in equity, of a transferee of property of a taxpayer,

¹The parties have stipulated that the injunction action is now moot and this proceeding is reduced to the action in intervention. [R. 19.]

in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter.

* * * * *

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

* * * * *

(26 U. S. C., 1952 ed., Sec. 311.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.311-1. *Claims in Cases of Transferred Assets.*— * * *

The term “transferee” as used in this section includes an heir, legatee, devisee, distributee of an estate of a deceased person, the shareholder of a dissolved corporation, the assignee or donee of an insolvent person, the successor of a corporation, a party to a reorganization as defined in section 112, and all other classes of distributees.

* * * * *

Statement.

The facts as found by the District Court may be stated as follows:

Taxpayer, Claire B. Morse, commenced a suit to enjoin the collection of the taxes which had been assessed against her as a transferee. The United States intervened, pursuant to the authorization of the Commissioner of Internal Revenue and the direction of the Attorney General of the United States, to collect the taxes from taxpayer. [R. 48-49.] As noted above, the parties have

stipulated that the injunction action is now moot and this proceeding is reduced to the action in intervention. [R. 19.]

The Commissioner of Internal Revenue made an assessment against Borin Art Products Corporation, an Illinois corporation, of declared value excess profits tax and excess profits tax, penalties and interest, for the calendar year 1942 and for the period January 1, 1943, through April 30, 1943, in the amount of \$110,334.07 and over-assessment in income tax in the amount of \$2,046.98. No part of the assessment was paid by the corporation. [R. 49.]

On April 30, 1943, the Borin Art Products Corporation was dissolved and on or about that date, all the assets of the corporation were transferred to a partnership, Borin Art Products Company. [R. 49.]

Upon the dissolution of the Borin Art Products Corporation, taxpayer did not receive directly any of the money, property or assets of the corporation but received for her interest of 80 shares in the corporation a 10% interest in the partnership Borin Art Products Company. Under the partnership agreement dated May 1, 1943, which created the partnership of Borin Art Products Company, taxpayer was one of the limited partners named therein and the agreed value of the 10% interest which she received in the partnership was \$12,000. [R. 49-50.]

Timely consents extending the period of limitations upon assessment of liability at law or in equity against a transferee were executed by taxpayer. The last consent, dated December 4, 1947, extended the period of limitations to June 30, 1951. [R. 50.]

On or about February 8, 1946, taxpayer executed a transferee agreement which was as follows [R. 50-51]:

Transferee Agreement

Date February 8, 1946

In consideration of the Commissioner of Internal Revenue not issuing a statutory notice of deficiency to and making an assessment against Borin Art Products Corporation, incorporated under the laws of the State of Illinois on September 15, 1932, the undersigned, Claire Borin, admits that he (or she) is a transferee of the assets of said Borin Art Products Corporation and assumes and agrees to pay the amount of any and all Federal income, excess-profits, or profits taxes finally determined or adjudged as due and payable by the Borin Art Products Corporation for the taxable year ended December 31, 1942, to the extent of her liability as transferee under the Internal Revenue Code.

The undersigned further agrees (1) not to contest or deny in court or otherwise liability as transferee, (2) in the absence of the prior written consent of the Commissioner, not to sell, transfer, or assign without adequate consideration all or any substantial portion of his (or her) assets, (3) upon request of the Commissioner, to execute consents in writing extending the period of limitation for assessment.

Claire B. Borin,

Transferee.

On or about February 8, 1946, taxpayer executed another transferee agreement, similar in all respects to the one set forth above, except that it covered the taxable period January 1, 1943, to April 30, 1943, of the Borin Art Products Corporation. Both agreements were delivered to the Government which accepted the agreements and relied thereon. [R. 51.]

On or about March 19, 1951, taxpayer executed Form 874 [Ex. Z]—"Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment." [R. 52.]

The form contained the following amounts and statement [R. 52]:

Deficiencies:

\$ 9,746.78 for the year 1942.
2,822.72 for the period January 1, 1943
to April 30, 1943

\$12,569.50

Overassessment:

\$ 1,490.02 for the year 1942.
373.79 for the period January 1, 1943
to April 30, 1943

\$ 1,863.81

"Represents undersigned's liability as a transferee of assets of Borin Art Products Corporation, Transferor, for income and excess profits taxes due from said Borin Art Products Corporation, Transferor."

On June 15, 1951, the Commissioner of Internal Revenue assessed against taxpayer, as transferee of the assets of Borin Art Products Corporation, deficiencies in taxes of the corporation in amounts as follows:

Taxable Period: Year 1942. Amount Assessed: \$11,177.24. Date of Assessment: June 15, 1951. Dates, Notice and Demands: June 25, 1951. Unpaid Balance: \$11,177.24. Taxable Period: Jan. 1, 1943, thru Apr. 30, 1943. Amount Assessed: \$3,588.89.

Date of Assessment: June 15, 1951. Dates, Notice and Demands: June 26, 1951. Unpaid Balance: \$3,588.89.

No part of any of the unpaid balances has been paid. [R. 53.]

The complaint in intervention was filed on May 31, 1957. [R. 53.]

Upon dissolution of Borin Art Products Corporation, as hereinabove set forth, the corporation was, and is, without property or things of value. [R. 53.]

The partnership agreement hereinabove referred to was not personally signed by taxpayer, nor did she authorize anyone to sign it for her at the time of its execution, but subsequent to the execution of the partnership agreement, she recognized and ratified the partnership agreement, and became obligated thereunder, as fully as though she had personally placed her signature thereon at the time of its execution. [R. 53.]

On or about February 8, 1946, taxpayer signed and verified a complaint [Ex. T] for dissolution of the partnership, Borin Art Products Company. The complaint was entitled "Complaint in Chancery for Dissolution of Partnership, Accounting, and Other Relief." The complaint alleged that taxpayer entered the partnership agreement dated May 1, 1943, and that the agreement was duly recorded in the office of the Recorder of Deeds of Cook County, Illinois. Taxpayer also alleged a 10% interest in the claims and causes of action of the partnership against certain insurance companies. [R. 53-54.]

Taxpayer signed Form 1040, United States individual income tax return, for the year 1944 in blank. The return reported only one item of income which was tax-

payer's distributable share, in the amount of \$32,239.42, of the partnership income of Borin Art Products Company. The tax liability of \$14,925.62 as shown on the return was paid. Taxpayer did not sign the Form 1040, United States individual income tax return for the year 1945. Her name was placed on the form by someone else without her knowledge. She did not have knowledge of its contents nor did she have knowledge of its filing at that time. The return reported only one item of income which was taxpayer's distributable share, in the amount of \$46,028.35, of the partnership income of Borin Art Products Company. The tax liability of \$26,596.39 as shown on the return was paid. [R. 54-55.]

During the period May 1, 1943, to termination of the partnership, no part of the monies, property or other assets belonging to the partnership, Borin Art Products Company, was distributed to taxpayer, nor did she withdraw any part of her distributable share of income as a partner of the partnership. [R. 55.]

The liability of taxpayer, Claire B. Morse, as transferee of the assets of Borin Art Products Corporation, to the United States of America is limited to \$12,000, the agreed value of the taxpayer's 10% interest in the partnership, Borin Art Products Company, as set forth in the partnership agreement dated May 1, 1943. [R. 55.]

At all times pertinent herein, taxpayer negotiated with the Internal Revenue Service through her attorneys or accountants concerning all matters pertaining to the transferee liability herein involved and followed their advice and recommendations in signing all documents, agreements, extensions, waivers, etc., pertaining to the liability. [R. 55.]

The District Court held that taxpayer was liable as a transferee, that the assessment against her as a transferee was validly made within the period of limitations as extended in writing and that taxpayer's liability as a transferee was limited to \$12,000, the agreed value of her interest in the partnership. [R. 56-57.]

Summary of Argument.

A transferee of a taxpayer's property is liable, under Section 311, of the Internal Revenue Code of 1939, at law or in equity, for the tax owed by the transferor to the extent of value of property received by the transferee. The transferee's liability is determined by state law. Here the applicable state law is that of Illinois as both parties agree.

The burden of proving transferee liability is on the Government. A *prima facie* case is established when the Government proves that there was a transfer of property without adequate consideration, that as a result of the transfer, the transferor was insolvent, that a proceeding against the transferor is useless and the value of the property transferred.

The Government showed that taxpayer was a stockholder of the corporation involved under Illinois law and a stockholder of a dissolved corporation is a transferee within the meaning of Section 311. Taxpayer's stock was transferred to the partnership which was formed for the purpose of taking over the corporation's assets and continuing the business of the corporation. In exchange for the stock transferred to the partnership, taxpayer received a 10% interest in the partnership of an agreed value of \$12,000. The assets of the corporation were transferred to the partnership. This left the corporation without anything of value and the corporation was dis-

solved. Accordingly, the Government established a *prima facie* case and sustained its burden of proof. The burden of going forward was on taxpayer and the District Court properly found that this burden was not sustained.

If the corporation had physically distributed the assets to taxpayer who then transferred them to the partnership in exchange for an interest in the partnership, there would not be any doubt that taxpayer would be liable as a transferee. Here, there was receipt in fact by the partnership of the corporate assets. The partnership was formed for the purpose of taking over the corporate assets and of continuing the corporation's business. The receipt by the partnership was on behalf of the partners who had received their partnership interest in exchange for and on the basis of their ownership of the corporation's stock. This receipt of the assets by the partnership was a constructive receipt by taxpayer who affirmed her interest in the partnership and was entitled to receive benefits from the partnership. The substance and effect of the transactions are the same.

The partnership agreement was competent to show taxpayer's ownership of the stock since taxpayer recognized and ratified the agreement in her verified complaint for dissolution of the partnership and an accounting. Taxpayer also recognized and ratified the partnership by filing her individual income tax return for 1944 reporting only one item of income which was her distributable share of the partnership income, by executing transferee agreements admitting that she was a transferee of the assets of the corporation involved, by executing various consents extending the periods of limitation upon assessment of transferee liability, and by executing a waiver of restrictions on assessment and collection of deficiency which stated her liability as a transferee of the corporation.

Taxpayer erroneously asserts that the assessment was invalid because the waiver was ineffective and no notice of deficiency was sent to her. Plainly the statute giving a taxpayer the right to file a waiver of restrictions on assessment does not mean filing the waiver with the Commissioner himself. A proper filing in the local office occurred here and the waiver obviated the need of sending a notice of deficiency.

Taxpayer cannot repudiate the partnership on the ground that it was a fiction and thereby manipulate her tax consequences. As this Court said in *Maletis v. United States*, the Commissioner should have the sole power to sustain or disregard the partnership if in fact it is unreal. "That which best serves the purpose of the tax statute should govern" and not the yearly exigencies of the taxpayer.

The District Court properly found definite facts pertaining to the contested matters. The District Court was not required to make overdetailed findings.

Taxpayer's liability as a transferee is her personal liability. The debts of the partnership are not involved and, therefore, taxpayer's liability as a limited partner for the debts of the partnership is immaterial. Since no payment of taxes assessed against the corporation was made on taxpayer's behalf, her argument of payment by others of an assessment against the corporation for years prior to those involved here is without substance.

The District Court, therefore, correctly held that the taxpayer was liable as a transferee under Section 311, Internal Revenue Code of 1939, since all of the corporate assets were transferred to the partnership and, in accordance with the partnership agreement which taxpayer ratified, she received 10% interest in the partnership in exchange for her corporate stock.

ARGUMENT.

The District Court Correctly Held That Taxpayer Was Liable as a Transferee Under Section 311, Internal Revenue Code of 1939, Since All of the Corporate Assets Were Transferred to the Partnership and, in Accordance With the Partnership Agreement Which Taxpayer Ratified, She Received a 10% Interest in the Partnership in Exchange for Her Corporate Stock

A. The Applicable Law.

A transferee of a taxpayer's property is liable, under Section 311, Internal Revenue Code of 1939, *supra*, at law or in equity, for the tax owed by the transferor to the extent of the value of the property received by the transferee. The remedy stated in Section 311 was intended to provide a more effective and summary method of collecting the tax whenever a taxpayer transferred his property and became unable to pay his tax. *Phillips v. Commissioner*, 283 U. S. 589; *Commissioner v. Stern*, 355 U. S. 810.

Under Section 311, whether a transferee is liable, at law or in equity, is determined by state law. *Commissioner v. Stern*, *supra*; *United States v. Bess*, 355 U. S. 861. The state law applicable here is that of Illinois, as taxpayer agrees (Br. 18), since the transferor was an Illinois corporation located in Illinois, its assets were transferred in Illinois to a partnership located in Illinois, the partnership agreement was ratified in Illinois, and the parties to the partnership agreement resided in Illinois. [R. 53-54, 140-142, 159.]

B. The Evidence Shows That the Government Sustained Its Burden of Proof.

The burden of proving transferee liability is on the Government. See Section 1119(a), Internal Revenue Code of 1939; *Phillips v. Commissioner, supra*; *Wilson v. United States*, 100 F. 2d 552 (C. A. 9th). A *prima facie* case is established when the Government proves that there was a transfer of property without adequate consideration, that as a result of the transfer, the transferor was insolvent, that a proceeding against the transferor is useless and finally the value of the property transferred. *Wilson v. United States, supra*; *Gobins v. Commissioner*, 18 T. C. 1159, affirmed *per curiam*, 217 F. 2d 952 (C. A. 9th); *Nau v. Commissioner*, 27 T. C. 999, affirmed (C. A. 6th) on November 26, 1958 (58-2 U. S. T. C., ¶9963); *Fairless v. Commissioner*, 67 F. 2d 475 (C. A. 6th). The District Court's implicit conclusion that the Government sustained its burden is fully justified.

A stockholder of a dissolved corporation is a transferee within the meaning of Section 311. *Kieferdorf v. Commissioner*, 142 F. 2d 723 (C. A. 9th), certiorari denied, 323 U. S. 733; Treasury Regulations 111, Section 29.311-1, *supra*. Under Illinois law, taxpayer was a stockholder of the corporation involved prior to its dissolution, as the District Court found. [R. 49.] She owned 80 shares of stock as set forth in the partnership agreement. [R. 141.] She argues that the partnership agreement was not competent evidence to show her stock ownership.² (Br. 24-27.) The Government introduced

²Taxpayer asserts that the District Court should have found that she never owned any stock because of her testimony that she did not know anything about the transactions. (Br. 23-24.) It is settled that the trial court is not bound to accept self-serving statements of a witness especially where, as here, the testimony was not wholly

into evidence taxpayer's complaint for dissolution of the partnership and an accounting. [Ex. T; R. 53-54, 159.] The complaint was introduced to show taxpayer's admission of her interest in the partnership and the prayer for dissolution and an accounting. [R. 99.] Expressly incorporated in the complaint as Exhibit A was the partnership agreement which set forth the basis for taxpayer's claim of an interest in the partnership. [R. 140, 160.] Without the partnership agreement, the complaint for dissolution and an accounting was incomplete and failed to show how taxpayer could claim a partnership interest. Certainly the trial court is not required to close its eyes to that which was clearly a part of the complaint and was in evidence. [R. 100.] Taxpayer did not object when the Government's counsel stated that the complaint for

consistent with itself, it was uncorroborated, it conflicted with documentary evidence and it was inherently improbable in the light of the circumstances. It is the trial court's duty to observe the witness and to weigh the evidence. *Quock Ting v. United States*, 140 U. S. 417; *Joe Balestrieri & Co. v. Commissioner*, 177 F. 2d 867, 875 (C. A. 9th); *Wilson v. United States*, *supra*, p. 555.

Taxpayer also asserts that the partnership was the sole stockholder of the corporation at the time of the dissolution and transfer of the corporate assets. (Br. 20-23.) This, however, is beside the point. The partners were the sole stockholders prior to the formation of the partnership. [R. 140.] The partnership was formed for the express purpose of taking over the assets of the corporation and continuing the operation of the business of the corporation. [R. 141.] And the pre-trial conference order expressly states [R. 12]: "Prior to said transfer of assets the shareholders of said corporation transferred their stock in said corporation to the said entity, Borin Art Products Company," the partnership. In exchange for this transfer of stock to the partnership, the partners received their partnership interest. [R. 141-142, 143-145.] The assertion that taxpayer's ownership of the stock prior to the formation of the partnership was immaterial (Br. 23) is plainly wrong.

Although taxpayer says the contents of the partnership agreement are not competent evidence against her, an extensive argument is made in the brief based upon the contents of the partnership agreement and intended to repudiate the partnership. (Br. 37-41.) The argument is not made as an inconsistent alternative argument.

dissolution was offered to show the truth of the allegations therein. [R. 99, 137.] To argue that the partnership agreement was not competent evidence to show her stock ownership, therefore, is wrong and the District Court properly considered the evidence [R. 49, 138-139] and properly denied the motion for new trial. [See R. 59-70; Br. 28-30.]

Of course taxpayer is bound by the partnership agreement, even though she did not sign it, because, as the District Court found, "she recognized and ratified the partnership agreement." [R. 53.] Illinois recognizes that a person may ratify an instrument even though the affixing of his signature initially was a forgery. In *Fay v. Slaughter*, 194 Ill. 157, 62 N. E. 592, the Supreme Court of Illinois said (p. 167):

* * * the above authorities are to the effect that when a forgery is committed there can be no pretense of authority, and, as is said in *Henry v. Heeb, supra*: "It is difficult to understand how one who is, in a sense, the victim of the criminal act, may adopt or ratify it." By the decisions of this State he might do so, but he would only be held to do so when it was shown that with a full knowledge of all the material facts he did ratify it. *Livingston v. Wiler*, 32 Ill. 387; *Hefner v. Vandolah*, 57 id. 520; *Chicago Edison Co. v. Fay*, 164 id. 323.

And as the Supreme Court of Illinois said in *Vetesnik v. Magull*, 347 Ill. 611, 617, 180 N. E. 390:

It is an established rule of agency that a subsequent ratification of the act of the agent is equivalent to an original authorization, and an agreement concluded by the agent and so ratified cannot, in the absence of the express consent of the other party, be limited to a part of the agreement. Such agree-

ment is a unit and must either be ratified or rejected as a whole. The acceptance of a part with full knowledge is constructively an acceptance of the whole. (*Morris v. Tillson*, 81 Ill. 607; *Gaines v. Miller*, 11 U. S. 395, 28 L. ed. 466.) Justice does not permit one to accept the part of a transaction beneficial to him and repudiate that part detrimental.

See also *Magid v. Drexel Nat. Bank*, 330 Ill. App. 486, 71 N. E. 2d 898; *Commercial Loan & Trust Co. v. Mal-lers*, 141 Ill. App. 460, affirmed, 237 Ill. 119, 86 N. E. 728. Taxpayer unequivocally recognized and ratified the partnership agreement in her verified complaint for dissolution of the partnership and an accounting. [R. 53-54.]

Taxpayer's argument (Br. 45-54) that the doctrine of ratification is not applicable and that the doctrine of estoppel is applicable is plainly without merit. The cases cited by taxpayer, *Hefner v. Dawson*, 63 Ill. 403, and *Chicago Edison Co. v. Fay*, 164 Ill. 323, 329, 45 N. E. 534 (Br. 46), are not contrary to the Government's contentions in the preceding paragraph. In *Chicago Edison Co. v. Fay*, the Illinois Court cited *Hefner v. Dawson*, *supra*, and reaffirmed its position with respect to ratification of a forgery but it stated that ratification will not be implied in doubtful circumstances. The court said (p. 329):

While this court has held that a forged note may be ratified by the principal so as to bind him (*Living's v. Wiler*, 32 Ill. 387, *Hefner v. Vandolah*, 62 id. 483, and *Hefner v. Dawson*, 63 id. 403), it has not, to our knowledge, been held in any case that a ratification of a forged instrument can be implied from a doubtful state of facts.

A doubtful state of facts does not exist here; the ratification is clear. In addition to the verified complaint for

dissolution of the partnership and an accounting, which complaint expressly incorporates therein as Exhibit A the partnership agreement, taxpayer filed her individual income tax return for the year 1944 reporting only one item of income which was her distributable share of the partnership income. The tax as shown on the return was paid. [R. 54.] Taxpayer also executed transferee agreements admitting that she was a transferee of the assets of the corporation involved and agreed to pay the amount of any federal income or excess profits tax to the extent of her transferee liability. [R. 50-51.] In addition, taxpayer executed various consents extending the periods of limitation upon assessment of transferee liability and taxpayer executed a waiver of restrictions on assessment and collection of deficiency which stated her liability as a transferee of the corporation. [R. 50, 52.] Plainly these acts constitute clear recognition and ratification of the partnership and taxpayer's interest therein acquired by virtue of her 80 share ownership in the corporation.

Accordingly, we have shown that the evidence fully justified the District Court's finding that taxpayer owned 80 shares of the stock prior to the dissolution of the corporation.³ Taxpayer does not dispute that all of the corporate assets were taken over by the partnership which

³The Illinois Stock Transfer Act (32 Smith-Hurd Illinois Annotated Statutes, Section 416) which requires delivery of the certificate does not invalidate taxpayer's ownership of the stock. *Chicago Title & Trust Co. v. Ward*, 332 Ill. 126, 163 N. E. 319; *In re Antkowskis' Estates*, 286 Ill. App. 184, 3 N. E. 2d 132. The Illinois Court said in *In re Antkowskis' Estates*, pp. 195-196, "the rights of parties as between themselves are not affected by the provisions of the Uniform Stock Transfer Act, and that it was not the intention of the legislature to change the rule of law applicable as between the immediate parties of the transaction." Thus, taxpayer's ownership of the 80 shares is unquestionable since she and her husband recognized that ownership in the partnership agreement.

was formed for the purpose of continuing the corporation's business. [R. 49, 141.] Nor does taxpayer dispute the fact that after this transfer the corporation was insolvent and was dissolved, and that a proceeding against the corporation is useless. [R. 53.] Although taxpayer disputes the District Court's finding that the value of the property received by taxpayer was the \$12,000 agreed value of the 10% partnership interest (Br. 43-44), it certainly was not unreasonable for the District Court to accept the parties' determination of the value of the partnership interest. See *Stokes v. Commissioner*, 22 T. C. 415; *Cury v. Commissioner*, 23 T. C. 305; *Newcomb v. Commissioner*, 23 T. C. 954; *Miller v. Commissioner*, 235 F. 2d 553 (C. A. 6th). Thus, under Illinois law, taxpayer would be liable as a transferee. See *Bouton v. Smith*, 113 Ill. 481; *Dillman v. Nadelhoffer*, 162 Ill. 625, 45 N. E. 680; *Birney v. Solomon*, 348 Ill. 410, 181 N. E. 318; *Second Nat. Bank of Robinson v. Jones*, 309 Ill. App. 358, 33 N. E. 2d 732; *La Crosse Mfg. Co. v. Springer*, 323 Ill. App. 525, 56 N. E. 2d 146; *Landers Frary & Clark v. Vischer Products Co.*, 201 F. 2d 319 (C. A. 7th).

Since the Government established all the elements necessary to form a *prima facie* case, the burden of going forward was on taxpayer. *Gobins v. Commissioner*, *supra*; *Robinette v. Commissioner*, 139 F. 2d 285 (C. A. 6th), certiorari denied, 322 U. S. 745, rehearing denied, 322 U. S. 772; *Reinecke v. Commissioner*, 220 F. 2d 406 (C. A. 8th). This burden of going forward is the meaning of the District Court's conclusion that "The defendant has not sustained her burden of proving that she is not liable, at law or in equity, as transferee of the assets of Borin Art Products Corporation, for deficiencies in taxes assessed against said Corporation". [R. 56.]

Therefore, taxpayer incorrectly argues under Point I, Br. 11-20, that "the trial court erred in assuming as a matter of law that appellant had the burden of proving that she was not liable as transferee of the assets of Borin Art Products Corporation."

Taxpayer misstates the facts when she says that the Government did not allege nonpayment of the taxes by the transferor-corporation. The Government alleged nonpayment by the transferor-corporation [R. 4] and introduced into evidence Exhibit V, certificate of assessments, which showed that the tax was not paid. [R. 101.] The District Court found nonpayment by the transferor-corporation. [R. 49.]

C. Taxpayer's Erroneous Arguments.

1. THE WAIVER WAS VALID.

Taxpayer erroneously contends that the assessment "rests on very infirm ground" because the waiver was not actually filed with the Commissioner and no notice of deficiency was sent to her. (Br. 16.) The District Court found that a waiver of restrictions on assessment and collection of deficiency in tax and acceptance of over-assessment was executed by taxpayer on or about March 19, 1951. [R. 52.] Stamped on the waiver is the Internal Revenue Service date of receipt, March 19, 1951. Unmistakably this is actual filing with the Commissioner; plainly the statute does not contemplate a filing with the Commissioner himself. *Moore v. Cleveland Ry. Co.*, 108 F. 2d 656, 660-661 (C. A. 6th). See also *Auerbach Shoe Co. v. Commissioner*, 216 F. 2d 693 (C. A. 1st); *Payson v. Commissioner*, 166 F. 2d 1008 (C. A. 2d); *Roos v. United States*, 31 F. Supp. 144 (C. Cls.); *Associated Mutuals v. Delaney*, 176 F. 2d 179 (C. A. 1st).

"The waiver obviated the need of sending the formal deficiency notice * * *." *Monge v. Smyth*, 229 F. 2d 361, 368 (C. A. 9th), certiorari denied, 351 U. S. 976; *Girard v. Gill*, 243 F. 2d 166 (C. A. 4th). See also *Daugette v. Patterson*, 250 F. 2d 753 (C. A. 5th), certiorari denied, 356 U. S. 902; *Cain v. United States*, 255 F. 2d 193 (C. A. 8th). *Steiner v. Nelson* (C. A. 7th), decided October 16, 1958 (58-2 U. S. T. C., ¶9871), relied on by taxpayer (Br 16), is not applicable because on the Form 870M there involved was a statement that the waiver was not valid unless accepted by the Commissioner. The Seventh Circuit found that the Commissioner had not accepted the waiver. There is not a similar clause on the waiver, Form 874, involved here. Certainly the Commissioner accepted and relied on the waiver here in making his assessment on June 15, 1951, without having sent the notice of deficiency. [R. 52.] See *Girard v. Gill*, *supra*.

The District Court found that taxpayer negotiated with the Internal Revenue Service through her attorneys or accountants and followed their advice and recommendations pertaining to her liability. [R. 55.] That taxpayer may have been misled by her attorneys or accountants with respect to the waiver, as she claims (Br. 16-17), does not vitiate the effect of the waiver. *Monge v. Smyth*, *supra*, p. 366. See also *Wheeler v. Holland*, 120 F. Supp. 383 (N. D. Ga.), affirmed, 218 F. 2d 482 (C. A. 5th). And even if taxpayer did not understand the nature of the waiver due to statements by her representatives, or because she neglected to read the waiver which on its face

was plainly different from the extension of time instruments, at most this is a unilateral mistake and it is well settled that such a mistake does not render the waiver invalid. See *Seymour v. Mackay*, 126 Ill. 341, 351, 18 N. E. 552, 553; *Shulman v. Moser*, 284 Ill. 134, 140, 119 N. E. 936, 938; *Flannery v. Flannery*, 320 Ill. App. 421, 431, 51 N. E. 2d 349, 354; *Chicago Title & Trust Co. v. City of Chicago*, 321 Ill. App. 271, 276, 52 N. E. 2d 1019, 1021-1022.

2. TAXPAYER CANNOT REPUDIATE THE PARTNERSHIP.

We have already shown and the District Court has found that taxpayer recognized and ratified the partnership. She now attempts to repudiate the partnership on the ground that in fact a true and bona fide partnership did not exist. (Br. 31-41.) However, the controlling principle has been stated as follows by this Court in *Maletis v. United States*, 200 F. 2d 97, 98:

As was said in *Higgins v. Smith*, 308 U. S. 473, at page 477, 60 S. Ct. 355, at page 358, 84 L. Ed. 406:

The Government may look at actualities and upon determination that the form employed for doing business or carrying out the challenged tax event is unreal or a sham may sustain or disregard the effect of the fiction as best serves the purpose of the tax statute.

* * * * *

The Bureau of Internal Revenue, with the tremendous load it carries, must necessarily rely in the vast majority of cases on what the taxpayer asserts to be fact. The burden is on the taxpayer to see to it that the form of business he has created for tax purposes, and has asserted in his returns to be valid,

is in fact not a sham or unreal. *If in fact it is unreal, then it is not he but the Commissioner who should have the sole power to sustain or disregard the effect of the fiction since otherwise the opportunities for manipulation of taxes are practically unchecked.* That which best serves the purpose of the tax statute should govern in this field and not the yearly exigencies of this taxpayer. (Italics supplied.)

Therefore, this taxpayer cannot now repudiate the partnership on the ground that it was a fiction and thereby manipulate her tax consequences.

This case is not like *Jacob v. Commissioner*, 139 F. 2d 277 (C. A. 9th), which is cited by taxpayer. (Br. 32.) This Court denied transferee liability in that case because of its finding that no gift of the Central Holding Company stock or other funds was made to the wife or children against whom transferee liability was being asserted. In the opinion it was stated (p. 279):

However, Jacob testified that his intention was to give his wife and children an interest in a going concern in the form of stock, but that the making of gifts of cash was not within his purpose. * * * True, also Jacob caused his shares to be reissued in petitioners' names, but this was after the fire and at a time when he appears already to have made up his mind to get out of the corporation and to give the shares to Barnes. * * *

* * * * *

The most the record can be said to show is that Jacob made to his family an Indian gift of the corporate stock while contemporaneously appropriating to himself a share of the corporate funds.

Here we have shown that the District Court properly found [R. 49-50] that taxpayer owned 80 shares of corporate stock prior to the dissolution and she received a 10% interest in the partnership in exchange for her stock.⁴

3. THE DISTRICT COURT PROPERLY FOUND THE FACTS.

Taxpayer claims that the District Court failed in its obligation to find the facts “by failing to include in its findings all the pertinent and uncontradicted facts shown by the evidence, as detailed in the proposed findings [R. 24-32], filed by appellant.” (Br. 12-13.) Surely the trial court does not have an obligation to find the facts as proposed by a particular party to the proceeding. Obviously these proposed findings may be objectionable. The trial judge fulfills his obligation when he finds definite facts pertinent to the contested matters. *United States v. Forness*, 125 F. 2d 928, 942-943 (C. A. 2d), certiorari denied *sub nom. City of Salamanca v. United States*, 316 U. S. 694. This Court has said that “The findings should be so explicit as to give the appellate court a clear understanding of the basis of the trial court’s decision, and to enable it to determine the ground on which the

⁴It is well settled that the trial judge properly excludes irrelevant evidence. Taxpayer asserts, nevertheless, that the divorce decree should have been admitted to show that the partnership was not recognized in the Illinois decree. (Br. 36.) This decree, which apparently did not specifically pass upon the validity of the partnership, was plainly immaterial in view of the representations of the taxpayer that such a partnership existed. Moreover, federal law and not a decree in a local proceeding for divorce determines the validity of a partnership for tax purposes. *Cf. Commissioner v. Tower*, 327 U. S. 280. Thus, the decree was properly excluded. [R. 134.]

trial court reached its decision.” *Irish v. United States*, 225 F. 2d 3, 8. We submit that explicit and fully comprehensive findings were made here which reveal clearly on this appeal the basis of the District Court’s decision. Manifestly, overdetailed findings—contrary to taxpayer’s contention—are not required.

4. THE TRUST FUND DOCTRINE IS APPLICABLE.

Taxpayer says that as a result of a conveyance in fraud of creditors the assets became a trust fund but that there is no equity to support the trust fund doctrine here. (Br. 19.) The defect in taxpayer’s argument results from her insistence that she never received assets from the corporation. (Br. 19-20.) If receipt in fact of the assets were the sole criterion for application of the trust fund doctrine, the slightest subterfuge would deprive the creditor of a meaningful remedy. The whole purpose of the trust fund remedy is to give the creditor a meaningful opportunity to obtain satisfaction for the debt owed to him. Here, there was receipt in fact by the partnership of the corporate assets. The partnership was formed for the purpose of taking over the corporate assets and of continuing the corporation’s business. The receipt by the partnership was on behalf of the partners who had received their partnership interest in exchange for and on the basis of their ownership of corporate stock. This receipt of the assets by the partnership is constructive receipt by taxpayer.⁵ Taxpayer affirmed her interest in the

⁵The result here is the same as if the assets of the corporation had been physically turned over to the taxpayer and she in turn physically delivered them to the partnership.

partnership and was entitled to receive benefits from the partnership. She is liable, therefore, to the extent of her interest in the partnership which in fact received the corporate assets. If the corporation had physically distributed the assets to taxpayer who then transferred them to the partnership in exchange for an interest in the partnership, would there be any doubt that taxpayer would be liable as a transferee? *California Iron Yards Corp. v. Commissioner*, 82 F. 2d 776 (C. A. 9th); *Fairless v. Commissioner*, 67 F. 2d 475 (C. A. 6th); *Hunn v. United States*, 60 F. 2d 430 (C. A. 8th); *Bates Motor Trans. Lines v. Commissioner*, 200 F. 2d 20 (C. A. 7th); *Caire v. Commissioner*, 101 F. 2d 992 (C. A. 5th). That the stock was transferred to the partnership for an interest therein and the partnership received the corporate assets does not insulate taxpayer from transferee liability. The substance and net effect of the transactions are the same.

Vendig v. Commissioner, 229 F. 2d 93 (C. A. 2d), cited by taxpayer (Br. 21) is distinguishable.⁶ In that case, the Second Circuit said (p. 95):

* * * exchanging stock of Sales [the liquidated corporation] for stock of Mavco [the liquidating corporation] petitioner did not remove cash or other property from Sales, thereby harming creditors of Sales who were entitled to be paid before any distributions to shareholders.

⁶In distinguishing the *Vendig* case from the *Bates Motor Trans. Lines* case, *supra*, the court pointed out that Chaddick (the transferee in the *Bates* case) was in full control of the two corporations involved whereas Eleanor Vendig did not even own voting stock (p. 95, fn. 3).

Here, the stock was transferred to the partnership for an interest therein and the only purpose of the partnership was to take over the corporate assets and to conduct the corporation's business. This is clearly a removal of the corporate assets—although circuitously—thus the situation here is not analogous to that in the *Vendig* case.

5. DEBTS OF THE PARTNERSHIP ARE NOT INVOLVED.

Taxpayer further argues that under Illinois law as a limited partner she was not liable for any of the debts of the partnership. (Br. 57.) Taxpayer's transferee liability here is her individual liability; not liability as a partner for a debt of the partnership. It is immaterial, therefore, to what extent taxpayer may be liable as a limited partner for a debt of the partnership.

6. NO PRIOR PAYMENT ON BEHALF OF TAXPAYER.

Finally, taxpayer contends that payment by others of the corporation's taxes for years prior to those involved here extinguished her transferee liability. (Br. 58.) Taxpayer does not claim that the payments were made on her behalf or with the intent to discharge her liability. Her contention, therefore, is plainly without substance.

Conclusion.

Since the Government sustained its burden of proof, the District Court correctly held that taxpayer was liable as a transferee under Section 311, Internal Revenue Code of 1939, because all of the corporate assets were transferred to the partnership and, in accordance with the partnership agreement which taxpayer ratified, she re-

ceived a 10% interest in the partnership in exchange for her corporate stock. The judgment of the District Court should be affirmed.

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December, 1958.



No. 15963

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLAIRE B. MORSE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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CLAIRE B. MORSE,

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Appellee.

APPELLANT'S REPLY BRIEF.

The government concedes (Br. 13) that it has the burden of proving transferee liability. Yet there are several elements of such liability which the government has clearly failed to establish.

1. The government must prove the value of the property transferred. This the government concedes (Br. 13).

(a) Assuming the government's theory (Br. 11) that there was distributed to appellant a 10 per cent interest in the partnership, that would be 10 per cent of the excess of the value of the assets over the liabilities at the time of the transfer. The record shows clearly that *after* the transfer additional federal taxes for years prior to those involved here were determined and paid [R. 13, par. 13, as corrected at R. 80]. Yet these additional liabilities were obviously not reflected by the "agreed" value shown in the purported partnership agreement.

(b) Also on the question of value of the alleged partnership interest, appellee repeats again and again a serious distortion of fact. As one instance of this (Br. 18), appellee says: “. . . it certainly was not unreasonable for the District Court to accept the parties’ determination of the value of the partnership interest.” The impression is there given that the term “parties” refers to the parties to this proceeding. This is heightened by appellee’s selection of cases in support of that point. Not one of the cases cited supports a value for the purposes involved here based upon a figure recited in a partnership agreement, but one of them, *Stokes v. Commissioner*, 22 T. C. 415, does contain a determination by the parties to the *tax proceeding*. It is clear, of course, that appellant here had no connection whatever with the recitation of value in the purported partnership agreement. It was not in any sense a determination by the parties to this proceeding.

2. In reference to the so-called transferee agreements, appellee quotes from the findings that the government “accepted the agreements and relied thereon.” As we have shown in our opening brief, at page 53, not only did the government not rely on those agreements; it in fact violated those agreements. There is, moreover, an additional factor which must be noted. Reliance itself is insufficient. As to those “transferee agreements,” and also any other documents signed by appellant, it must be shown that the government relied thereon to its *detriment*. (*Girard v. Gill* (C. A. 4), 59-1 U. S. T. C. par. 9144, decided Dec. 15, 1958. There was no such showing here.

3. Appellee contends that even though the purported partnership agreement was introduced only to prove the forgery the trial court could rely on it generally because it was incorporated as Exhibit A in the complaint, Exhibit

T herein, by reference. As its reason appellee states (Br. 14) that "Without the partnership agreement, the complaint for dissolution and an accounting was incomplete." However, it was also incomplete for other reasons. The purported partnership agreement was attached as Exhibit A and a copy of a letter purporting to terminate appellant's interest in the partnership was attached as Exhibit B [R. 99]. That Exhibit B, nevertheless, the government failed to produce [R. 99], and, contrary to appellee's statement (Br. 14-15), appellant did object to the introduction of Exhibit T [R. 128]. The objection made by appellant was to every part of Exhibit T other than the signature pages, because there was no indication that any of the other pages were the same as those that were before her when she signed.

If appellee now reasons that Exhibit A to that complaint was necessary to make it complete, then so was Exhibit B. By appellee's own reasoning Exhibit T herein was objectionable and should not have been admitted.

4. Among the elements for which appellee relies wholly upon the purported partnership agreement is the one that the partnership "was formed for the express purpose of taking over the assets of the corporation and continuing the operation of the business" (Br. 14, ftm.).

The parties expressly stipulated, however, that at the time of the liquidation of the corporation the partnership was in existence and was the sole shareholder [R. 12]. The actual transfer of corporate assets was to the partnership [R. 12]. The shareholders at no time received any interest in them. This is what happened and what actually happened governs. As stated in *Helvering v. Tex-Penn Oil Co.*, 300 U. S. 481, 493, 57 S. Ct. 569, 574, "The validity of the ultimate finding . . . is to be tested by

what in fact was done rather than by the mere form of words used in the writings employed." To the same effect, *Hatch Estate v. Commissioner* (C. A. 9), 198 F. 2d 26. If there was in fact a partnership at all the partnership was the transferee and not the individuals.¹

5. Appellee attempts an argument that under Illinois law "a person may ratify an instrument even though the affixing of his signature initially was a forgery" (Br. 15). As clearly stated, however, in 10 C. J. S. 1077, citing numerous cases, including *Hefner v. Dawson*, 63 Ill. 403, 14 Am. Rep. 123, "the rule in such cases rests, however, on the doctrine of estoppel rather than that of ratification." To support the result in such cases it must be shown that the principal either received a benefit or induced the other party to change his position to his prejudice. The very cases cited by appellee support this.

Thus, it is stated in *Fay v. Slaughter*, 194 Ill. 157, 169-170, 62 N. E. 592, 596-597:

"In the absence of express ratification, leaving aside the equitable view of it, he could not be deemed, in law, by implication, to have ratified the acts of Anderson [agent] unless with a knowledge of its source, and the material facts relating to the manner in which it came into his bank account were brought home to him, and then, with that knowledge, *appropriated the money, or part of it, to his use. . . .* In this record there is no evidence showing, or tending to show, that plaintiff in error got the *real benefit*

¹Appellee contends in the same footnote (Br. 14) that appellant herself bases her argument in part on the contents of the partnership agreement. But this is strictly an alternative argument as shown by the clear terms of appellant's opening brief. The title there, page 37, begins with the word "Even." See, also, page 38, "The *so-called* partnership agreement," and "taking the document itself at face value." (Italics added.)

of any of this money, either by checking it out for his own use or by its being checked and applied to his business.” (Italics added.)

In *Living v. Wiler*, 32 Ill. 387, it is likewise stated, at page 399:

“But *plaintiff has received and appropriated the proceeds of this mortgage to her own use*, just as much as if she had received the proceeds in gold, and placed it in her pocket; and that too, after she knew all about it, and even after she had denied and protested that it was not her mortgage, but was a forgery. After she knew all this, and when she knew that the proceeds of the mortgage stood to her credit in her account against [her bankers] she sued them upon that account, *and obtained judgment against them* for this account, thus including the proceeds of this mortgage.” (Italics added.)

In *Hefner v. Vandolah*, 57 Ill. 520, it was stated, at page 521:

“It is conceded that the signature to the note in controversy is not the genuine signature of the appellant. The evidence abundantly establishes that it is a forgery. The single question presented, is whether the appellant, by his declarations and conduct, is *estopped* from denying the execution of the note.” (Italics added.)

In *Hefner v. Dawson*, *supra*, referring to the case of *Hefner v. Vandolah*, *supra*, the court likewise based its conclusions on the elements of estoppel.

And in *Chicago Edison Co. v. Fay*, 164 Ill. 323, 45 N. E. 534, 536, it was stated:

“But the finding was, and we think properly so under the evidence, that there was not sufficient evi-

dence to show that Fay *knowingly took or retained any of Slaughter & Co.'s money* derived from the transfers of stock, and it was necessary to show knowledge on the part of Fay before an implied ratification could be established on the grounds attempted."

The case of *Vetesnik v. Magull*, 347 Ill. 611, 617, 180 N. E. 390, cited by appellee (Br. 15-16) involved no forgery and still the court there relied on the elements of estoppel. There the principal received the benefits. The same is true in *Magid v. Drexel Nat. Bank*, 330 Ill. App. 486, 71 N. E. 2d 898, and *Commercial Loan & Trust Co. v. Mallers*, 141 Ill. App. 460, affirmed, 237 Ill. 119, 86 N. E. 728, cited by appellee. In the latter case there was a benefit to the principal and in the former there was a detriment to the other party.

As the court here found, while appellant sued she never received anything [R. 55]. And estoppel cannot be based on a claim on which no recovery is had. *Shinsaku Nagano v. McGrath* (C. A. 7), 187 F. 2d 753, 758. Indeed here there was not even any proof that the suit was ever prosecuted. When the trial court asked whether the suit was ever prosecuted, government counsel answered, "I don't know, your Honor" [R. 101].

Not only does ratification under Illinois law require the elements of estoppel. As shown in appellant's opening brief, at page 47, that is exactly what the court below meant by ratification. That court meant estoppel. But the elements of estoppel were not established. This appellee's brief does not deny.

6. As the cases above cited also show, a ratification can only be made with full knowledge of all the facts. As more

clearly stated in *Scharf v. Solomon*, 297 Ill. App. 155, 17 N. E. 2d 240, 242:

“A party alleging, asserting, or relying on a ratification of the unauthorized act of an agent has the burden of proving it. To sustain the burden of proof, the party on whom it rests must show that the ratification was made under such circumstances as to be binding on the principal; he must show that the principal intended to ratify and, at the time of ratification, had full knowledge of all the material facts connected with the transaction. 3 C. J. S., Agency, Sec. 319(2).

“In the case of the *Farmers National Bank v. Trautwein*, 228 Ill. App. 356, it is said: ‘It is a well-settled rule that knowledge of the terms and conditions of an unauthorized contract entered into by an agent is not to be presumed from the fact that the principal had a reasonable opportunity to acquire such knowledge. . . . “A principal’s ratification of an agent’s unauthorized act must be clearly shown, either directly or impliedly, from clear and unequivocal circumstances.” In order to bind a principal by ratification, assent or acquiescence in prior acts of his agent in excess of authority actually given, a knowledge of the material facts must be brought home to him. He must have been in possession of all of the facts and must have acted in light of such knowledge. 21 R.C.L. 928; *Coleman v. Connolly*, 242 Ill. 574-583, 93 N.E. 278, 134 Am. St. Rep. 347; *Cadwell v. Meek*, 17 Ill. 220-227.’ ”

But here the trial court itself said, as noted in appellant’s opening brief, page 47, “I feel sorry for Mrs. Borin because I don’t think she knew what was going on.”

Furthermore, appellee’s attempt in that connection to show that no doubtful state of facts exists (Br. 16-17)

contains specific misstatements. For example, there is the statement that the "taxpayer filed her individual income tax return for the year 1944 reporting only one item of income which was her distributable share of the partnership income." This is wholly false. As the court below found [R. 54], she signed that return in blank. She didn't know at all what it was about.

Again, the record showing [R. 85] that there was no delivery of any stock certificate to appellant, appellee contends, in a footnote (Br. 17), that this does not invalidate her ownership of the stock, that her ownership is adequately shown by the partnership agreement. Thus as to ownership of the stock appellee relies, not upon independent evidence, but again upon the theory of ratification, which as shown above is wholly inapplicable here.

Furthermore, much more recent authority shows that under Illinois law delivery is necessary for a transfer of stock. *Shinsaku Nagano v. McGrath, supra*, at p. 756, 23 A. L. R. 2d 1189-1190.

Besides, as shown in appellant's opening brief, page 21, citing *Jacob, et al. v. Commissioner* (C. A. 9), 139 F. 2d 277, delivery may be important for tax purposes. In that case as here, there was no delivery, and there, as here, no actual assets were received by the alleged recipient of a stock ownership. There likewise transferee liability was involved and it was held that no such liability arose. Here, what Nathan Borin did, including the forgery of the partnership agreement, was precisely the same *solitaire* as occurred in the *Jacob* case.

7. Appellee attempts (Br. 18) to twist the trial court's language "burden of proving" into meaning "going forward" with the evidence. As shown in appellant's opening

brief, page 13, moreover, this language was drafted by appellee and not by the court. What the trial court did was to accept appellee's assumption at the trial that the burden of proof was upon appellant. That this was error, appellee now concedes.

8. In regard to the payment of the taxes involved, appellee apparently admits that there is no proof that the taxes assessed against the transferor were not paid. At Br. 7, it says that "No part of the unpaid balances has been paid," citing R. 53, which shows that the reference is to the assessments against appellant as transferee. At Br. 19, appellee repeats this statement. Appellee also states there that there was no payment by the corporation, the alleged transferor. But it does not say anywhere that the taxes of the transferor were not paid. Indeed, appellee stated before the trial court [R. 101-102] that this was for the taxpayer to prove. It is clear, as shown in appellant's opening brief, pages 55-56, that this is an essential element of the government's case which the government has failed to establish.

9. Appellee attempts to cite the decision of this court in *Maletis v. United States*, 200 F. 2d 97, which involved the controlling individual in a fictitious family partnership, for the proposition that any other person whose name he uses in the fictitious structure is bound by what he does. This court in that case held no such thing. Nor did the Supreme Court in the case there cited, *Higgins v. Smith*, 300 U. S. 473. The very contrary is true, as shown by this court's decision in *Jacob v. Commissioner, supra*, cited in appellant's opening brief, page 21. Appellee attempts (Br. 22) to distinguish that case but what happened there is exactly what happened here. As in that case another person, Nathan Borin, and not the appellant, was trying

to use a fictitious partnership for his own purposes. Appellant here was only one of the victims, as in the *Jacob* case.

Besides, as was just recently held by this court in *Robinson v. Elliot*, 59-1 U. S. T. C. par. 9129, decided Dec. 5, 1958, the taxpayer too may recast a transaction to show its substance for tax purposes. Also, as pointed out above citing *Helvering v. Tex-Penn Oil Company*, *supra*, what in fact was done is what governs. If Nathan Borin were before this court now, the *Maletis* and *Higgins* cases would be pertinent. But we have here not the malefactor but one of his victims. And as the court below held again and again [R. 105-106, 132], the equities are in her favor.

Indeed, the *Maletis* case supports appellant here. This court there stated, "Maletis gained a tax benefit by not including his share of the taxable gains of the partnership in 1946." Thus this court there applied the doctrine of estoppel. As applied here, it clearly supports appellant. That doctrine lends no support to appellee here.²

10. Appellee says (Br. 24-25), "Taxpayer affirmed her interest in the partnership and was entitled to receive benefits from the partnership." But the partnership agreement by its own terms was the same kind of Indian gift as was involved in the *Jacob* case, *supra*. Not only did Nathan Borin in fact treat the partnership agreement as a scrap of paper. By its own terms it was little more than that. For not only did appellant receive nothing out of the

²Appellee, in a footnote (Br. 23), attempts to say that the validity of the alleged partnership involved here is to be determined solely by federal law, so that no doubt was cast on it by the decree in the Illinois divorce proceeding. But the issue here is one of transferee liability which appellee concedes is determined by the law of Illinois.

purported partnership, and not only did Nathan Borin use up its funds for his own personal purposes so that there could be nothing left for her to receive. It is difficult from the agreement itself to spell out that she was entitled to receive anything.

11. Appellee (Br. 25) attempts to tie the formation of the alleged partnership and the liquidation of the corporation into a single transaction, so as to show the “net effect” of the transaction. Appellee should tie into it also then appellee’s own admission in the court below that the purported transfer of stock into appellant’s name prior to the formation of the alleged partnership and without her knowledge was “part of the scheme for dissolution of the corporation and creating the partnership” [R. 136]. Appellee should also tie into it the forgery of appellant’s signature on the documents involved in that “scheme,” and the consumption of the assets of the purported partnership by Nathan Borin for his personal uses. If “net effect” is to be given, then the entire involvement of appellant in the transaction is completely washed out.

Appellee, indeed, points up this issue in its distinction of *Vendig v. Commissioner* (C. A. 2), 229 F. 2d 93, from *Bates Motor Transport Lines, Inc. v. Commissioner* (C. A. 7), 200 F. 2d 20 (Br. 25). In a footnote there appellee shows that the distinction between the *Vendig* case and *Bates* case is that in the *Bates* case the transferee involved was in full control of the two entities involved, whereas in the *Vendig* case the transferee involved had no control at all. That is exactly the distinction here from the *Bates* case, and shows that the *Vendig* case is clearly applicable. As shown above, in connection with the *Maletis* and *Higgins* cases, we have here not the malefactor but one of his victims.

12. Appellee attempts by use of a separate point to avoid the issue of limited liability (Br. 26) but fails to give effect to what actually happened, as shown in the *Vendig* case. In the case here, as there, it was another business entity and not the individuals to which the assets were removed. If appellant received any interest in the so-called partnership she did not receive it from the corporate transferor.

13. On the issue of the exhaustion of transferee liability by prior payments, appellee contends that the payments on the prior years, that is 1940 and 1941, were not made on appellant's behalf (Br. 26). But the stipulation in the court below is clearly to that effect. It says [R. 13] that certain amounts were assessed against appellant and that the "*said* amounts" were subsequently paid in full by persons other than plaintiff (appellant here). (*Italics added.*)

Conclusion.

In conclusion appellant submits again that the judgment entered below was erroneous and that appellant is not liable as a transferee of Borin Art Products Corporation.

Respectfully submitted,

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